# INDEX.


| | PAGE |
|---|---|
| Caption | |
| Complaint | 1 |
| Exhibit "A"—Letter, Natural Gas Pipeline Company of America to Panoma Corporation, dated 9/9/52 | 1 |
| Exhibit "B"—Photostat of Natural Gas Pipeline Company of America—Statement showing: Quantities by billing months, of gas purchased by Natural Gas Pipeline Co., of America from Panoma Corporation between 8/1/52 and 7/1/54, etc. | 8 |
| First Amended Answer of Defendants to Complaint | 11 |
| Exhibit #1—Letter, Agreement Panoma Corporation to Natural Gas Pipeline Co., of America, dated 8/19/52 | 12 |
| Motion of Plaintiff for Summary Judgment | 31 |
| Stipulation of Counsel dated 11/18/55 in support of and in opposition to Motion for Summary Judgment | 35 |
| Exhibit #1—Excerpts of Contract between Natural Gas Pipeline Co., of America and D. D. Harrington, et al., dated 12/1/46 | 36 |
| Exhibit #1a—Excerpts from letter supplementing the contract, dated 2/25/48, which dealt with the point of delivery of gas used by Natural for compressor station operation, and the price therefor | 47 |
| Exhibit #1b—Excerpts from Assignment dated 10/1/48, by D. D. Harrington, et al., composing the partnership doing business under the firm name of Harrington & Marsh, to Panoma Corporation, of the gas purchase contract entered into by said partnership with Natural, as of 12/1/46 | 47 |
| | 48 |

## INDEX—Continued

PAGE

Stipulation of Counsel, etc.—(Continued):

Exhibit #1c—Excerpts from Amendment to the contract, dated 19/1/49, restating the gas reserves dedicated to the performance of the contract ..... 48

Exhibit #2—Excerpts from Report of the Corporation Commission of Oklahoma and Order No. 26,096, issued in Cause No. CD 3628 on 7/29/52, fixing a minimum price for gas produced in the Guymon-Hugoton, Field of Oklahoma ..... 48

Exhibit #3—Letter, Natural Gas Pipeline Company of America to Panoma Corporation, dated 8/26/52 ..... 50

Exhibit #3a—Letter, Panoma Corporation to J. J. Hedrick, President, Natural Gas Pipeline Co., of America, dated 8/30/52 ..... 54

Exhibit #3b—Memorandum of Letter of Natural Gas Pipeline Company to Panoma Corporation, dated 9/9/52 a copy of which is attached to the Complaint as Exhibit "A" ..... 56

Exhibit #4—Letter, D. D. Harrington to Natural Gas Pipeline Co., of America, dated 6/25/54 ..... 57

Exhibit "A"—Excerpts of "Instrument of Assumption", dated 7/1/54, recites, that, as of said date, Panoma Corporation was dissolved, and its properties, etc. ..... 61

Exhibit #5—Letter, D. D. Harrington, et al., to Natural Gas Pipeline Company of America, dated 7/1/54 ..... 62

## INDEX—Continued

PAGE

Stipulation of Counsel, etc.—(Continued):
Exhibit #6—Excerpts from Opinion of the Supreme Court of Oklahoma, affirming the order of the Corporation Commission of Oklahoma (Exhibit #2 to the stipulation). Said Opinion is reported in 272 P. 2d 425 64
Exhibit #7—Per Curiam Decisions, April 11, 1955 ..... 64
Exhibit #9—Excerpts from an Order of the Federal Power Commission adopted 12/9/53, in Docket G-2083, etc. ..... 65
Exhibit #10a—Excerpts from an Order of the Federal Power Commission dated 3/30/55 permitting certain increased rates of Natural to become effective ..... 68
Exhibit #11—Letter from Natural Gas Pipeline Company of America to First National Bank & Trust Co., of Oklahoma City, dated 9/25/52 ..... 69
Affidavits in Support of and in Opposition to Motion for Summary Judgment ..... 70
Affidavit of J. G. Dickinson, dated 11/25/55 ... 70
Affidavit of Coleman Hayes, dated 11/18/55 .... 72
Supplemental Affidavit of Coleman Hayes, dated 12/23/55 ..... 75
Exhibit "A"—Transcript of Proceedings before the Corporation Commission of the State of Oklahoma, Cause CD No. 3628 ..... 77
Case called for hearing, etc. ..... 77
Colloquy between Court and Counsel .. 78
Exhibit "B"—Order No. 26,111, dated 7/31/52 ..... 81

PAGE

Affidavits, etc.—(Continued):
Affidavit of T. Murray Robinson, dated 12/27/55 84
Exhibit "A"—Supersedeas Bond ..... 89
Affidavit of D. D. Harrington, dated 12/31/55 .. 90
Letter, dated 1/12/56 from Vinson, Elkins, Weems & Searls, Attys., to Hon. Joe E. Estes, Judge, U. S. District Court ..... 96
Order of Federal Power Commission Denying Petition for Rehearing and Request for Oral Argument, Issued 1/5/56 in case entitled "In The Matter of Dorchester Corporation", Docket No. G-6505 ..... 97
Order of Federal Power Commission denying proceedings, issued 1/5/56 in case entitled "In the Matter of Dorchester Corp., Docket No. G-6505 ..... 99
Excerpts from Oral Argument had before the Hon. Joe E. Estes, U. S. District Judge on 1/6/56, on the motion of Summary Judgment of Natural Gas Pipeline Company of America .. 103
Opinion of Hon. Joe E. Estes, U. S. District Judge, dated 3/9/56 ..... 111
Judgment, entered 3/22/56 ..... 136
Notice of Appeal by Plaintiff Natural Gas Pipeline Company of America ..... 138
Notice of Appeal by Defendants, D. D. Harrington, et al. ..... 140
Appeal Bond of Plaintiff, Natural Gas Pipeline Company of America ..... 141
Appeal Bond of Defendants, D. D. Harrington, et al. 142
Statement of Points by Appellant, Natural Gas Pipeline Company of America ..... 144
Statement of Points by Appellants, D. D. Harrington, et al. ..... 146
Clerk's Certificate ..... 148

## CAPTION.

BE IT REMEMBERED that on January 6, 1956, in the District Court of the United States for the Northern District of Texas, Amarillo Division, the Honorable Joe E. Estes, United States District Judge Presiding, the following came on regularly for hearing and was heard, to-wit:

Civil Action No. 2070.

NATURAL GAS PIPELINE COMPANY OF AMERICA, a Corporation,

Plaintiff,

versus

D. D. HARRINGTON, STANLEY MARSH, JR., ESTELLE FARISS MARSH, ISABEL MARSH McCORMICK, AND T. J. WAGNER, JR.,

Defendants.

---

## PLAINTIFF'S ORIGINAL COMPLAINT.

Filed September 2, 1955.

United States District Court for the Northern District of Texas, Amarillo Division.

Natural Gas Pipeline Company of America, a Corporation, Plaintiff,

v. Civil Action No. 2070.

D. D. Harrington, Stanley Marsh, Jr., et ux., Estelle Fariss Marsh, Isabel Marsh McCormick, and T. J. Wagner, Jr., Defendants.

1. Plaintiff is a corporation incorporated under the laws of the State of Delaware. The defendants are citizens of the State of Texas, residing within the jurisdiction of this Court. The matter in controversy

exceeds, exclusive of interest and costs, the sum of $3,000.00.

2. At all times herein mentioned, and now, plaintiff has been, and is, a natural gas company, as defined in the Natural Gas Act of 1938, as amended, purchasing, transporting and selling natural gas in interstate commerce for resale for domestic, industrial and other consumption, and operating under certificates of public convenience and necessity issued by the Federal Power Commission.

3. As of December 1, 1946, plaintiff entered into a gas purchase contract with defendants (and other parties), then partners doing business under the firm name of Harrington & Marsh, which provided for the delivery of natural gas (after the removal of liquefiable hydrocarbons therefrom) to be produced from described gas reserves in the Guymon-Hugoton Field in Texas County, Oklahoma, the contract enduring as long as Sellers were able to produce gas in paying quantities. Said contract was amended on February 25, 1948; was assigned by Harrington & Marsh to Panoma Corporation, a Delaware corporation, on October 1, 1948; and was further amended to redescribe the gas reserves as of October 1, 1949. The contract and its amendments provided for a price, for a 5-year period which included that commencing on July 1, 1951, of 7c per Mcf, measured at a pressure of 16.4 psia and 60 F., subject to stated variation according to the BTU content of the gas, except that such price was to be reduced by 1c per Mcf as to gas used in plaintiff's compressor station, and with provision that such price should adjust to valid regulation of constituted authorities.

4. On July 29, 1952, the Corporation Commission of the State of Oklahoma entered in its Cause CD 3628 its Order No. 26096, effective on and after August 1, 1952, providing that no gas should be produced from any well located in the Guymon-Hugoton Field of Oklahoma except at a price of not less than 9.8262c per Mcf if sold at the wellhead, and that if the gas is processed for the extraction of liquid hydrocarbons and sold during or upon conclusion of gathering, the price for the residue gas shall be not less than 9.8262c per Mcf, the volumes measured at a pressure of 14.65 psia and at a temperature of 60 F. Plaintiff had intervened in said cause, and, as permitted by the Oklahoma law, appealed from the Order. Said order was affirmed by the Supreme Court of the State of Oklahoma on April 27, 1954, in the case of Natural Qas Pipeline Company of America v. Corporation Commission, 272 P. 2d 425. Plaintiff appealed the cause to the Supreme Court of the United States, and on April 11, 1955, that Court held the order invalid in a memorandum decision reported, under the same style, in 349 U.S. 44, 99 L.ed. 472.

5. Said order of the Commission, if valid, operated to prevent production of the dedicated gas and delivery thereof to Natural in accordance with the terms of such contract and to require, in order to obtain such deliveries, that Natural pay the minimum price set forth in the order, notwithstanding the lower prices set forth in the contract. Panoma, through its counsel, informed plaintiff that it expected to comply with the order and that unless payments were made at the minimum price set forth in such order, Panoma construed such order as requiring it to discontinue deliveries to Natural of gas in accordance with the provisions of the contract.

6. The gas deliverable under Natural's contract with Panoma constituted a substantial portion of Natural's source of supply, and any increase in the cost thereof would substantially increase Natural's cost of service and, thereby, in turn, the price paid by ultimate consumers of gas in the consuming areas served by Natural. It would have been impossible to replace, during pendency of Natural's appeal from such order, the supply of gas which Panoma was required by the contract to deliver at any reasonable price.

7. Plaintiff advised Panoma Corporation, by letter of September 9, 1952, a copy of which is attached hereto, marked Exhibit "A" and made a part hereof, that if the order should be held invalid, it would assert against Panoma Corporation a claim for restitution for the increase in price exacted by the duress of the order, with lawful interest thereon. Thereafter, until after the decision of the Supreme Court of the United States above referred to, all payments for gas made by plaintiff under such contract were at the minimum price fixed by such order, and all sums were so paid to Panoma for deliveries through the month of June 1954.

8. There is attached hereto, made a part hereof and marked Exhibit "B," a statement showing, during the period ending July 1, 1954, the quantitites of gas delivered each month, the contract prices therefor, the price paid under protest, and the difference between the contract prices and the price paid under protest, and interest at the rate of 6% per annum computed to July 31, 1955.

9. On July 1, 1954, Panoma Corporation, pursuant to a plan of liquidation, transferred all of its assets to defendants who were its sole stockholders and became dissolved and simultaneously therewith said stockholders conveyed certain of its properties (including its most valuable properties) received in liquidation, including those subject to the gas purchase contract of December 1, 1946, to third parties, and, in connection therewith, assigned said contract. Upon such transfer, said corporation ceased to do business and surrendered its permit to do business in Texas. Upon such dissolution, defendants, as its stockholders, received assets from which they have presently received sums in excess of 40 million dollars in cash, which constitute a trust fund for the payment of the indebtedness of Panoma Corporation, and such sum as has become due plaintiff as refund because of the fact that thereafter the order of the Oklahoma Commission was held invalid as applied to the purchase of gas by plaintiff from Panoma. Plaintiff is entitled under the doctrines of restitution and unjust enrichment to have refunded or returned to it the principal sum of $1,623,770.23, with interest at the rate of 6% per annum computed from the date of each monthly payment.

10. On July 1, 1954, defendants, in consideration of the execution by Natural of a certain consent to the assignment of the contract between Panoma and Natural, executed and delivered to plaintiff an agreement reading as follows:

"The undersigned constitute all of the stockholders of Panoma Corporation as they existed prior to July 1, 1954, at 10:00 o'clock A.M. Central Standard Time,

as of which hour and date Panoma Corporation transferred all of its assets to such stockholders. The undersigned are thereafter conveying certain of the properties received in liquidation, including those subject to that certain Gas Purchase Contract dated as of December 1, 1946, between Natural Gas Pipeline Company of America and Harrington & Marsh (previously assigned to Panoma Corporation), except as to the gas reserves covered by said contract found in horizons situate below sea level.

"Please refer to letter of September 9, 1952, from you to Panoma Corporation, in which you stated that you were paying under protest the price, to the extent in excess of the contract price, required by the order of the Corporation Commission of Oklahoma, No. 26096, effective on and after August 1, 1952, as to gas delivered under the contract.

"It was understood that your execution and delivery of a certain instrument dated June 25, 1954, consenting to the assignment of the Gas Purchase Contract from Panoma Corporation to us, and from us to third persons, was contingent upon your obtaining the following agreement upon our part, to-wit:

"That we hereby jointly and severally agree on behalf of ourselves, our executors, administrators and assigns to pay you or cause to be paid you any sums of money with lawful interest thereon which you are entitled to have refunded or returned with respect to the payments to Panoma Corporation in excess of the contract price made under protest referred to in said letter of September 9, 1952. We do also jointly and severally, for ourselves, our heirs, executors, ad-

ministrators and assigns agree to and do hereby acknowledge and assume any obligations imposed upon Panoma Corporation by virtue of the letter you addressed to it under date of September 9, 1952."

Defendants, therefore, are obligated to pay to Natural such sum of $1,623,770.23 with interest thereon not only because of the fact that they acquired all of the assets of Panoma, as sole stockholders of such corporation at the time of such dissolution, but also as a direct obligation of said defendants incurred in favor of this plaintiff for a valuable consideration to pay to Natural the excess sums so paid under protest.

11. Plaintiff has requested payment from defendants, who have refused to pay.

Wherefore, plaintiff demands judgment against defendants and each of them in the sum of $1,623,770.23, with interest at the rate of 6% per annum computed from the dates, respectively, of each such overpayment, and for all costs of this action.

CLARENCE H. ROSS,
WARREN T. SPIES,
D. H. CULTON,
Attorneys for Plaintiff,
By D. H. CULTON.

ROSS & O'KEEFE,
122 South Michigan Avenue,
Chicago 3, Illinois.
CULTON, MORGAN, BRITAIN & WHITE,
American National Bank Building,
Amarillo, Texas.

EXHIBIT "A".

Natural Gas Pipeline Company of America
20 N. Wacker Drive
Chicago 6, Illinois
Phone RAndolph 6-0278—L.D. 411

September 9, 1952

Panoma Corporation
Amarillo, Texas

Gentlemen:

By Order No. 26096, entered in Cause CD No. 3628 on July 29, 1952, effective on and after August 1, 1952, (the enforcement of which order was stayed until September 10, 1952, by the Commission's Order No. 26111 entered July 31, 1952), it is required, among other things, that no gas shall be produced from the Guymon-Hugoton Field of Oklahoma except at a price of not less than 9.8262c per thousand cubic feet if sold at the wellhead, and that if the gas is processed for extraction of liquid hydrocarbons and sold during or at the conclusion of gathering, the price for the residue gas shall be not less than 9.8262c per thousand cubic feet; volumes to be measured at a pressure of 14.65 pounds per square inch absolute and at a temperature of 60 degrees Fahrenheit.

Your counsel has informed us that you interpret such order as applying to the gas sold by Panoma to this Company under contract entered into between Don Harrington, et al., as sellers, and Natural Gas Pipeline Company of America, as buyer, dated as of December 1, 1946, as amended; and has also informed us that, unless payments be made by us at the minimum price set forth in such order instead of

the price set forth in such contract) you construe such order as requiring you to discontinue thd delivery of gas produced by you in the Guymon-Hugoton Field in Oklahoma to us in accordance with the provisions of such contract of December 1, 1946, as amended.

Natural denies that such order can lawfully be applied to the gas so purchased by it from you under such contract of December 1, 1946, as amended. It has filed a notice of appeal from such Order No. 26096, and will prosecute that appeal and litigate the validity of that order as applied to the gas which Natural purchases from Panoma under such contract of December 1, 1946, as amended.

Pending final adjudication as to the validity of such order as applied to the gas so purchased by Natural from Panoma under such contract, it is necessary that the gas which you have agreed by such contract to sell and deliver to Natural be delivered to it in order that Natural may fulfill its obligations to its customers and thus provide supplies of gas in the consuming areas to which Natural transports gas in accordance with its certificates of public convenience and necessity. It is impossible for Natural to replace such gas, during the pendency of such proceedings, with gas from any other sources, on any reasonable basis.

Natural fully recognizes that, in the event such Commission order is held valid and applicable to the gas which is sold to Natural under such contract, the price provisions of such contract will be adjusted to conform to such order. It is necessary, in the public's interest as well as in the interest of Natural, that Natural's dedicatory rights under such contract of December 1, 1946, as amended, be fully protected and preserved pending the appeal from such order.

Natural will, therefore, each month, upon receipt of proper accounting statements, pay in accordance with the contract price and, in addition thereto, will make payments for the difference between such contract price and the price fixed by the Commission for such gas in said order.

Payments of all sums in excess of the contract price, however, will be made involuntarily and under protest because of the compulsion and coercion resulting from the threat of the order itself and your interpretation of such order as prohibiting you from producing and delivering such gas to Natural under said contract at a price less than the minimum price fixed by the Commission in such order.

You will understand, of course, that each payment of such difference is and will be made involuntarily, and under protest without an express repetition of the protest and the grounds thereof at the time of each payment. In the event such order shall be held invalid or inapplicable to the gas sold and delivered by you to us under such contract, Natural will assert the right under familiar doctrines of business compulsion, unjust enrichment and restitution to a return to Natural of the additional payments so made under protest, with lawful interest thereon.

Yours very truly,

NATURAL GAS PIPELINE
COMPANY OF AMERICA,
By J. J. HEDRICK,
President.

CCM. jb

EXHIBIT "B

NATURAL GAS PIPELINE COMPANY OF AMER

Statements showing: quantities by billing months, of gas purchas
of America from Panoma Corporation between August 1, 1952 and Ju
purchase contract dated as of December 1, 1946, and amendments t
of said gas; the amounts paid under the decree of Order No. 2609
Commission; the over-payments above the contract prices; and cal
per annum to July 31, 1965.

| Delivery Period | Quantities In MCF Delivered Under Contract Other Than Fuel Gas (1) | Quantities In MCF Delivered Under Contract For Fuel Gas (1) | Contract Price Per MCF For Gas Other Than Fuel Gas (2) | Contract Price Per MCF For Fuel Gas (3) | Total Contract Price |
|---|---|---|---|---|---|
| August, 1952 | 1,969,423 | 34,615 | 6.99065978 | 5.99065978 | $ 76,234.32 |
| September | 1,389,697 | 35,043 | 6.99067853 | 5.99067853 | 92,194.71 |
| October | 1,384,811 | 36,196 | 6.99037782 | 5.99037782 | 98,829.70 |
| November | 1,294,762 | 34,746 | 6.99367667 | 5.99367667 | 93,493.10 |
| December | 1,345,895 | 35,834 | 6.97878360 | 5.97878360 | 97,463.60 |
| January, 1953 | 1,380,417 | 35,631 | 6.97708218 | 5.97708218 | 99,443.72 |
| February | 1,434,540 | 32,220 | 6.98071369 | 5.98071369 | 101,376.62 |
| March 1 to 22 | 994,954 | 25,051 | 6.97765464 | 5.97765464 | 70,921.91 |
| March 23 to April 22 | 1,522,945 | 34,365 | 6.97961830 | 5.97961830 | 108,350.65 |
| April 23 to May 22 | 1,469,891 | 32,730 | 7.00676378 | 6.00676378 | 104,957.83 |
| May 23 to June 22 | 1,652,390 | 34,327 | 7.00583716 | 6.00583716 | 117,790.57 |
| June 23 to July 22 | 1,779,789 | 33,446 | 6.98488253 | 5.98488253 | 126,301.35 |
| July 23 to August 22 | 1,883,621 | 34,583 | 6.98670991 | 5.98670991 | 133,879.36 |
| August 23 to September 22 | 2,003,096 | 34,327 | 6.97964345 | 5.97964345 | 141,855.31 |
| September 23 to October 22 | 1,516,477 | 25,773 | 7.00911811 | 6.00911811 | 107,940.39 |
| October 23 to November 22 | 2,345,913 | 38,305 | 7.05333298 | 6.05333298 | 167,783.76 |
| November 23 to December 31 | 2,968,682 | 48,303 | 6.98429856 | 5.98429856 | 210,232.21 |
| January 1 to 22, 1954 | 1,753,368 | 28,249 | 6.98087282 | 5.98087282 | 124,982.95 |
| January 23 to February 22 | 2,158,871 | 39,113 | 6.98057566 | 5.98057566 | 153,040.80 |
| February 23 to March 22 | 1,804,669 | 25,415 | 7.05722076 | 6.05722076 | 129,584.64 |
| March 23 to April 22 | 1,991,436 | 38,648 | 7.05829541 | 6.05829541 | 142,962.37 |
| April 23 to May 22 | 2,371,702 | 40,681 | 7.07065085 | 6.07065085 | 170,164.37 |
| May 23 to June 22 | 1,833,389 | 41,493 | 7.08583717 | 6.08583717 | 131,721.91 |
| June 23 to July 1 | 488,383 | 9,845 | 7.07536515 | 6.07536515 | 35,132.93 |
| | 39,658,621 | 900,961 | | | $2,827,636.48 |

(1) Pressure base 16.4 psia.
(2) 7¢ per MCF adjusted for BTU variation.
(3) 7¢ per MCF adjusted for BTU variation, less 1 cent.
(4) 9.8963¢ MCF without adjustment for BTU variation, at pressure base of 14.65 psia.
(5) Interest accrues after July 31, 1955 at approximately 1/2 of 1% of Principal or $8,118.85 monthly.

IBIT "B"

ART OF AMERICA

gas purchased by Natural Gas Pipeline Company
1952 and July 1, 1954, under provisions of gas
endments thereof; the stated contract prices
er No. 26096 of the Oklahoma Corporation
on; and calculation of interest thereon at 6%

| Total Contract Price | Amount Paid Under Order 26096 of Oklahoma Corporation Commission (4) | Excess | Number of Interest Days to 7-31-55 | Interest Factor at Rate of 6% per annum | Interest to 7-31-55 ($) | Total Claim |
|---|---|---|---|---|---|---|
| 76,234.32 | $ 120,344.18 | $ 44,109.86 | 1,042 | .171287671 | $ 7,555.48 | $ |
| 92,136.71 | 145,720.33 | 53,595.62 | 1,013 | .166639548 | 8,924.77 | |
| 98,829.70 | 156,329.73 | 57,481.03 | 983 | .161589041 | 9,288.30 | |
| 92,493.10 | 146,345.90 | 53,752.80 | 954 | .156821918 | 8,429.62 | |
| 97,463.60 | 154,189.12 | 56,725.52 | 926 | .151233877 | 8,578.76 | |
| 98,643.72 | 155,767.19 | 57,323.47 | 891 | .144468753 | 8,285.93 | |
| 101,376.02 | 160,234.31 | 58,858.29 | 863 | .141863014 | 8,352.65 | |
| 70,921.91 | 112,200.37 | 41,278.46 | 829 | .136273973 | 5,625.18 | |
| 108,350.65 | 171,383.69 | 63,953.04 | 800 | .131506849 | 8,278.76 | |
| 104,957.83 | 165,287.98 | 60,330.15 | 767 | .126082192 | 7,606.56 | |
| 117,798.57 | 185,517.58 | 67,719.01 | 738 | .121319068 | 8,215.34 | |
| 126,301.35 | 199,452.31 | 73,150.96 | 704 | .115726027 | 8,468.47 | |
| 128,079.36 | 202,193.23 | 74,113.87 | 681 | .111948393 | 8,296.69 | |
| 141,855.31 | 224,106.14 | 82,250.83 | 646 | .106191781 | 8,734.36 | |
| 107,840.39 | 169,647.18 | 61,806.79 | 618 | .101589041 | 6,278.29 | |
| 167,783.76 | 262,263.64 | 94,479.88 | 586 | .096328767 | 9,101.11 | |
| 210,232.21 | 331,867.72 | 121,635.51 | 555 | .091232877 | 11,097.16 | |
| 124,982.98 | 195,946.46 | 71,883.31 | 522 | .085808219 | 6,168.28 | |
| 153,040.80 | 241,777.78 | 88,736.98 | 496 | .081534247 | 7,235.10 | |
| 129,584.64 | 202,688.81 | 73,104.17 | 467 | .076767123 | 5,611.64 | |
| 142,902.37 | 223,307.96 | 80,405.59 | 437 | .071835616 | 5,775.99 | |
| 170,164.37 | 265,361.54 | 95,197.17 | 408 | .067068493 | 6,384.73 | |
| 131,721.91 | 205,127.82 | 73,405.91 | 378 | .061315068 | 4,500.89 | |
| 35,182.93 | 54,804.94 | 19,622.01 | 346 | .056876712 | 1,117.74 | |
| 827,656.48 | $4,451,426.71 | $1,623,770.23 | | | $178,004.32 | $1,801,774.55 |

6% monthly.

## DEFENDANTS' AMENDED ANSWER.

Filed December 23, 1955.

(Title Omitted.)

### First Amended Answer.

Comes Now D. D. Harrington, Stanley Marsh, Jr., Estelle Fariss Marsh, Isabel Marsh McCormick, and T. J. Wagner, Jr., and file this their First Amended Answer to Plaintiff's Complaint and state as follows:

I.

The Defendants admit the allegations contained in Paragraph 1 of the Complaint.

II.

The Defendants admit the allegations contained in Paragraph 2 of the Complaint, and further allege that with respect to the sale and delivery of gas to Natural Gas Pipeline Company of America (Natural) under the contract at the respective times as alleged in the Complaint Harrington & Marsh and Panoma Corpration (Panoma) were Natural Gas Companies as defined in the Natural Gas Act of 1938, as amended, transporting and selling such natural gas in interstate commerce to Natural for resale for domestic, industrial and other consumption, but operating without certificates of public convenience and necessity issued by the Federal Power Commission and without filing any rate schedule or contract with respect to the sale and delivery of gas to the Plaintiff.

III.

Defendants admit the allegations contained in Paragraph 3 of the Plaintiff's Complaint.

IV.

The Defendants admit the allegations contained in Paragraph 4 of the Plaintiff's Complaint.

V.

The Defendants deny the allegations contained in Paragraph 5 of the Plaintiff's Complaint; Panoma did not at any time threaten or inform Natural that it would discontinue any delivery of gas to Natural; but on the contrary, after said Order specifying the price of no less than 9.8262c per thousand cubic feet was entered on July 29, 1952, and made effective as of August 1, 1952, that thereafter sales and deliveries were made to Natural by Panoma without knowledge as to whether Natural would pay the price specified in such Order until Panoma received the letter of September 9, 1952 (Exhibit A to Plaintiff's Complaint).

VI.

The Defendants deny the allegations contained in Paragraph 6 of the Plaintiff's Complaint.

VII.

In answer to Paragraph 7 of the Plaintiff's Complaint, the Defendants admit that Natural sent a letter under date of September 9, 1952, to Panoma, a copy of which is attached as Exhibit A to the Plaintiff's Complaint, but they deny that the price paid

by Natural after September 9, 1952, was paid under legal compulsion, duress or coercion of any kind or character. Defendants further state that Panoma did not accept nor accede to the self-serving terms as set forth in said letter and that no answer or acceptance of said letter was made by Panoma, and deny that the payment by Natural for gas at the rate of 9.8262c was exacted under compulsion or duress of Order No. 26096 of the Oklahoma Corporation Commission, but admit that said price was paid for all gas sold and delivered by Panoma to Natural from August 1, 1952, to July 1, 1954. Defendants allege that all such payments were voluntarily made by Natural to Panoma without legal coercion, compulsion or duress as is hereinafter more fully alleged.

VIII.

In answer to Paragraph 8 of Plaintiff's Complaint, the Defendants admit that the computations as shown on Exhibit B are true and correct, but deny each and every heading and statement on said Exhibit which indicates an excess payment to Panoma or that any such payments were made under duress or compulsion or that Panoma is obligated to repay to the Plaintiff any sum or any interest on any sum as set forth in said Exhibit B.

IX.

The Defendants deny the allegations contained in Paragraph 9 of the Plaintiff's Complaint, but admit that Panoma, pursuant to a Plan of Liquidation, transferred all of its assets to Defendants, who were its sole stockholders, and became dissolved and simul-

taneously therewith said stockholders conveyed certain of the properties received in liquidation, including a portion of those subject to the Gas Purchase Contract of December 1, 1946, to third parties and in connection therewith assigned said contract. The Defendants admit that upon said transfer, said corporation ceased to do business and surrendered its permit to do business in the State of Texas, but the Defendants further allege that said corporation was and is a Delaware Corporation and that under the law of the State of Delaware as provided in Section 278 of the Delaware Code of 1953 that said corporation is continued for a term of three (3) years from July 1, 1954, for the purpose of prosecuting and defending suits by or against it and enabling it to settle and close its business and to dispose of and convey its properties, all as more fully set forth in said Delaware Code of 1953.

The Defendants specifically deny that the Plaintiff is entitled under the doctrines of restitution and unjust enrichment or any other doctrine or right, legal or equitable, to have refunded or returned to it the principal sum of $1,623,770.23, with interest at the rate of six per cent (6%) per annum, computed from the date of each monthly payment.

X.

In answer to Paragraph 10 of the Plaintiff's Complaint, the Defendants deny each and all of the allegations thereof except they admit that under date of July 1, 1954, they executed and delivered to Natural the letter referred to in said paragraph, a portion of which is quoted therein.

XI.

In answer to Paragraph 11 of the Plaintiff's Complaint, the Defendants admit that the Plaintiff has requested payment from the Defendants and that by letter of National dated the 31st day of August, 1955, the Defendants denied that they were obligated to make any payments to the Plaintiff.

XII.

For special answer, the Defendants allege that if the Plaintiff has any cause of action, which is denied, that it is one for restitution and unjust enrichment and such action is a proceeding in equity and any recovery is not allowable as a matter of right but is ex gratia resting in the sound discretion of the Court; and under all of the facts and circumstances it would be inequitable to permit the recovery as sought by the Plaintiff and it will not give offense to equity and good conscience to permit Defendants to retain the difference between the contract rate and the rate of 9.8262c paid by Natural to Panoma; that to enforce the unfiled contract rate and to allow such a recovery would be in opposition to public policy as expressed in the Natural Gas Act that the only enforceable rate is the rate on file with the Federal Power Commission; that Plaintiff has sustained no pecuniary loss by reason of the payment of the higher rate as it has obtained from the Federal Power Commission higher rates from its customers based upon the payment by Natural to Panoma of said rate of 9.8262c; that said rate of 9.8262c was not an unjust and unreasonable rate but was actually lower than many prices being paid for natural gas subsequent to August 1, 1952 by

Natural and others in the same area from which Panoma produced gas which was sold and delivered to Natural; that Natural could have avoided payment of said rate of 9.8262c by merely superseding Order No. 26096 issued by the Oklahoma Corporation Commission on July 29, 1952, as it had done with respect to the 7c order, that Natural could have superseded Order No. 26096 by making bond as principal without a surety and such facts were known to Natural, but it elected voluntarily to make payment at such price without being under any compulsion or coercion to do so; that said minimum price was found by the Oklahoma Corporation Commission to be necessary to prevent physical and economic waste of the gas sold and delivered by Panoma to Natural subsequent to August 1, 1952, and such finding was not disputed or overturned by either the Supreme Court of Oklahoma or of the United States that the Supreme Court in holding Order No. 26096 invalid did not find that the rate of 9.8262c was unjust, unreasonable, discriminatory or not necessary to prevent waste and not made in the aid of conservation, but held that the exclusive jurisdiction to fix the price or rate for the gas was in the Federal Power Commission under the Natural Gas Act; that the Federal Power Commission decided in Docket No. G-6505 on November 14, 1955, that the effective rate between Panoma and Natural on June 7, 1954, was said rate of 9.8262c and that such rate would be recognized by the Commission as the effective rate and the Federal Power Commission has uniformly allowed all other sellers in the field having a lower contract rate to charge and collect the rate of 9.8262c as their rate in effect under the Natural Gas Act; that Panoma has made substantial payments to its royalty owners based upon the Oklahoma

minimum price orders for the natural gas sold and delivered by it to Natural and it has paid production taxes based on such minimum prices; that in making payments for such natural gas based upon the 9.8262c minimum price, Natural has bound and foreclosed Panoma from ever claiming any different or higher price or adjustment of such price by stating on the checks issued in payment thereof that the acceptance of the check constitutes full payment of and settlement for the account described in the attached statement; that under all the facts and circumstances that to allow such recovery by Natural would be contrary to equity and good conscience.

XIII.

Defendants further alleged that Natural is not entitled to recover from the Defendants any sums which Natural has paid to Defendants for the reason that Natural has passed on to its customers all sums which Natural has paid to Panoma and that the rates allowed by the Federal Power Commission to Natural, pursuant to applications filed by Natural, were based upon the payment by Natural to Panoma of a rate of 9.8262c for all gas sold and delivered by Panoma to Natural from August 1, 1952, to July 1, 1954, and thereafter by Panoma's successor in interest, Dorchester Corporation.

XIV.

In reply to each and all of the claims asserted in Plaintiff's Complaint and for further special answer herein, Defendants allege that the Gas Purchase Contract dated December 1, 1946, which was entered

into by Plaintiff with Defendants (and other parties), and all amendments to such Contract, as referred to in Paragraph 3 of Plaintiff's Complaint, were entered into while both the Plaintiff and the Defendants were Natural Gas Companies and subject to the terms, conditions and provisions of the Natural Gas Act, and such Act was a part and parcel of such Contract the same is if copied at length therein, and that Section 4(c) of the Natural Gas Act provides:

"(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services."

and that Section 21 of said Act provides as follows:

"Sec. 21. (a) Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this act required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished by a fine of not more

than $5,000 or by imprisonment for not more than two years, or both.

"(b) Any person who willfully and knowingly violates any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority of this act, shall, in addition to any other penalties provided by law, be punished upon conviction thereof by a fine of not exceeding $500 for each and every day during which such offense occurs. (52 Stat. 833 (1938); 15 U.S.C. 717 (1946) )."

Defendants further alleged, however, that the Defendants did not know that they were Natural Gas Companies, as defined in the Natural Gas Act, until the decision of the Supreme Court of the United States of America in the case of Phillips Petroleum Company v. Wisconsin, 347 U.S. 672, decided on June 27, 1954, but that at all times during the period involved in the Plaintiff's Complaint, the contract rate was not applicable to gas sold and delivered to the Plaintiff as it was not on file with the Federal Power Commission and that such rate not having been filed with the Commission as required by the Natural Gas Act, the only price or rate applicable between the parties was the price paid by the Plaintiff to Panoma from time to time for the gas sold and delivered by the Defendants to the Plaintiff and that the price provision provided in the contract is nugatory and of no force and effect as it had not been made effective under the provisions of the Natural Gas Act. Both the Plaintiff and Panoma were Natural Gas Companies and subject to the terms and provisions of the Natural Gas Act. The contract of December 1, 1946, was entered into between Harrington & Marsh at a

price to commence at 6c per Mcf measured at a pressure base of 16.4 psia. Deliveries commenced under this contract in August of 1948. Upon the commencement of such deliveries, all sales and deliveries made thereunder were subject to the terms and conditions of the Natural Gas Act. Neither the contract of December 1, 1946, nor any rate applicable to the sale and delivery of such gas was filed with the Federal Power Commission as is required by the Natural Gas Act. Under the law, the only rate which the Plaintiff or the Defendants had the legal right to insist upon or enforce was a rate legally on file with the Federal Power Commission. The Plaintiff cannot now enforce the contract rate as the legal and binding rate when such rate was not the filed rate under the law during the period when the gas was delivered to the Plaintiff. The price paid by the Plaintiff to Panoma for the gas sold and delivered by Panoma to the Plaintiff during the period from August 1, 1952 to July 1, 1954, represented less than the just and reasonable value and the reasonable market price for such gas sold and delivered and each payment represented in accord and satisfaction between the parties for the gas theretofore sold and delivered. The Plaintiff has not paid any sums to Panoma or to the Defendants which it is entitled to recover, and to allow the Plaintiff any recovery would be contrary to the provisions of the Natural Gas Act and to the applicable law, and in equity and good conscience the Plaintiff has no claim or cause of action against Panoma or the Defendants.

XV.

For further special answer, these Defendants allege that since the prices and rates to be paid for natural gas as set forth in said contract of December 1, 1946, were not filed as schedules of rates with the Federal Power Commission as required by the Natural Gas Act and as under the provisions of said Act the only lawful rates which either seller or buyer can legally enforce are the rates on file with the Federal Power Commission, the provisions in such contract providing for prices and rates not so filed are unlawful and illegal and cannot be enforced in law or in equity, and the Court should leave the parties where it finds them.

XVI.

For further answer these Defendants allege that on December 9, 1946, the Oklahoma Corporation Commission issued its Order No. 19514 in Cause CD-1054 fixing the minimum price of 7c per thousand cubic feet of natural gas measured at a pressure of 14.65 pounds per square inch for all gas taken out of the structures or formations in the Guymon-Hugoton Field, Texas County, Oklahoma. Said order was appealed to the Supreme Court of Oklahoma and to the Supreme Court of the United States, both of which Courts upheld the order of the Commission fixing said price and upheld the jurisdiction of the Corporation Commission to fix the price of gas in the Guymon-Hugoton Field for the purpose of conservation and the protection of correlative rights.

Such 7c order was effective as of January 1, 1947, and although deliveries commenced under the contract of December 1, 1946, in August of 1948, no demand was made by the sellers against the Plaintiff for the difference between the contract price and the 7c price until the Supreme Court of the United States affirmed the 7c order on December 11, 1950, in the case of Cities Service Oil Company v. Peerless Oil & Gas Company, 340 U.S. 179. In January of 1951, Panoma made demand on Natural for the difference between the contract price and the 7c price, plus interest thereon. On February 13, 1951, Natural refused payment thereof. In March of 1951, Panoma was required by virtue of its leases and under the applicable law to pay and did pay to its royalty owners an additional sum of $314,000 in back royalties and production taxes representing the difference in royalties and production taxes based upon 7c as the reasonable market price for the gas produced from the Guymon-Hugoton Field and the price provided in the contract of December 1, 1946. Thereafter and until August 1, 1952, $98,000 in such additional royalties and taxes was paid by Panoma to its royalty owners.

The Oklahoma Corporation Commission, after hearing, entered its Order No. 24745 on May 17, 1951, and directed Natural to pay to Panoma the difference between the price provided for in the contract and the 7c price provided for in Order No. 19514 and thereafter to pay 7c for volumes delivered to Natural, within a period of twenty (20) days from the date of said order, or, in the alternative, ordered Panoma to shut in its wells. Natural applied to the Corporation Commission for leave to file a supersedeas bond pending appeal, which leave was granted, and Natural

posted its bond in the amount of $1,500,000 and superseded such order. Natural appealed said order to the Supreme Court of Oklahoma which affirmed the decision of the Corporation Commission on the 23rd day of March, 1954, and is reported in 271 P. 2d 354. Thereafter, Natural applied for and was granted a writ of certiorari and said cause became Cause No. 191 in the Supreme Court of the United States, October Term 1954. Natural made no payments to Harrington & Marsh or Panoma under the 7c minimum price order, but the sellers were required and did pay their royalty owners on a basis of said 7c minimum price order as aforesaid.

Order No. 26096 was issued by the Oklahoma Corporation Commission on July 29, 1952, effective as of August 1, 1952, fixing a minimum price of 9.8262c per Mcf at 14.65 psia. Natural intervened in said cause before the Commission and as permitted by the Oklahoma law appealed from said order. Natural did not supersede said order as it had the right to do and as it had done with respect to the 7c order. The order was affirmed by the Supreme Court of Oklahoma on April 27, 1954, in the case of Natural Gas Pipeline Company of America v. Corporation Commission, 272 P. 2d 425. This cause was numbered 321 in the Supreme Court of the United States, October Term 1954. The decision of the Supreme Court of Oklahoma in No. 191 and No. 321 was reversed in a memorandum decision by the Supreme Court of the United States reported in 349 U.S. 44, 99 L.Ed. 472, on the sole ground that under the Natural Gas Act the Federal Power Commission had exclusive jurisdiction to fix the prices and rates at which natural gas is sold into interstate commerce.

After the entry of the order in August of 1952, Natural sent Panoma its letter of September 9, 1952, attached as Exhibit A to the Plaintiff's Complaint, wherein it stated that it was paying such price under protest, which letter as hereihabove alleged was not answered or acquiesced in by Panoma. Natural made payments to Panoma at the rate of 9.8262c for all gas sold and delivered for the period from August 1, 1952, to July 1, 1954. Natural was under no legal compulsion or coercion to make such payments and it could have superseded said 9.8262c as it had the 7c order under which it made no payments whatsoever to Panoma. Panoma paid its royalty owners and the Oklahoma production tax on the basis of the 9.8262c order and from August 1, 1952 to July 1, 1954, it paid to its royalty owners extra royalty and taxes in the amount of $237,000, and extra production taxes in the amount of $84,279.00, which extra royalty and taxes were payable because of the 9.8262c price. Natural was not required to make such payments, but could have superseded Order No. 26096, and Natural was not under any business compulsion or duress or coercion of any kind or character and all payments made by Natural to Panoma were voluntarily made, and Natural is not entitled to recover any of such payments or interest thereon.

All payments made by Natural to Panoma represented a minimum price which was necessary to prevent physical and economic waste of the gas sold and delivered during such period and the decisions of the Supreme Court of the United States in holding the orders of the Oklahoma Commission invalid did not find that such was not a proper and just basis for the entry of such orders, but held that since the de-

cision in the Phillips case, supra, the Federal Power Commission under the Natural Gas Act had exclusive jurisdiction to control and regulate the price of gas to be paid by Natural to Panoma. Natural is not entitled either in law or in equity to recover or to have refunded or returned to it any sum paid by Panoma as alleged in its Complaint.

XVII.

For further special answer, the Defendants allege that under Letter Agreement dated August 19, 1952, that Panoma Corporation entered into a contract with Natural Gas Pipeline Company of America to sell and deliver to it supplemental volumes of gas at the same delivery point and in a common stream with the volumes of gas being delivered and to be delivered under the contract of December 1, 1946. A copy of such Letter Agreement of August 19, 1952, with respect to the sale of supplemental volumes of gas from the Guymon-Hugoton Field is attached hereto as Exhibit No. 1. Supplemental volumes were sold and delivered to Natural under said Letter Agreement from August 19, 1952, to August 1, 1953, and from January 23, 1954, to October of 1954. The volumes of the supplemental gas had to be estimated and it was necessary to make various adjustments each month with respect to both the volume and the British thermal unit content of the supplemental gas in the common stream as the Letter Agreement provided for an adjustment of the price based upon the British thermal unit content of the supplemental gas. Natural reported to Panoma the volume and quality of gas taken and Panoma invoiced Natural on the basis of such information, stating separately the amount due for the

gas delivered under the contract of December 1, 1946, and the amount due for the supplemental volume of gas. Natural remitted the amount of the invoice each month in one check covering the aggregate amounts due for volumes delivered under the contract of December 1, 1946, and under the Supplemental Letter Agreement of August 19, 1952. Pursuant to direction of Panoma, until April of 1954 the checks were sent to The First National Bank and Trust Company of Oklahoma City and thereafter were sent directly to Panoma for all gas sold and delivered to July 1, 1954, when the properties were sold to Dorchester Corporation. The contract provided in Article Sixth that:

". . . Any statement or invoice shall be subject to correction within one (1) year after payment made by Natural for gas delivered during any calendar month, but if claim for correction is not made within that time, such statement and invoice shall become final as to both parties."

Despite such provision in the contract, each such check and voucher attached thereto contained the following condition and statement, with appropriate changes for the period involved:

"Acceptance of this check constitutes full payment of and settlement for the account described on the statement attached . . . (perforation) Payment of gas purchased on original and supplemental contracts from June 23, 1954, to 10:00 a.m. July 1, 1954."

Panoma, acting through its agents, accepted each such check under the terms and conditions as stated thereon in full payment and settlement of accounts

for gas delivered under the December 1, 1946 contract and the Supplemental Letter Agreement of August 19, 1952, said accounts being unliquidated and in bona fide dispute. Such acceptance constituted a compromise and settlement and an accord and satisfaction between the parties with respect to all gas delivered under the contract of December 1, 1946, and the Supplemental Letter Agreement of August 19, 1952, and was supported by a valuable consideration and is valid and binding upon the parties hereto and no recovery may be had on the original contract.

In addition to the foregoing, during each month in which no supplemental gas was delivered, Natural reported to Panoma the volume and quality of gas taken and, based upon such report, Panoma then billed Natural for the volume sold and delivered during such billing period. In each case Natural remitted the amount of the bill each month by check, which check contained the following condition:

"Acceptance of this check constitutes full payment of and settlement for the account described on the statement attached."

The voucher attached to each such check contained a statement describing the volume of gas which Natural had reported to Panoma as being the volume delivered to it during the preceding billing period. Panoma accepted such offer of settlement in each case and cashed the checks in full payment and settlement of account for gas delivered under the December 1, 1946, contract for each such billing period and thereby forgave and waived the rights it had under the contract to later question the correct-

ness of the statement and/or invoice. The account being in bona fide dispute between the parties, the offer of Natural and the acceptance thereof by Panoma of each such check constituted a compromise and settlement and an accord and satisfaction between the parties supported by a valuable consideration and is binding upon the parties hereto and no recovery may be had on the original contract.

## XVIII.

In further answer to the Plaintiff's Complaint, the Defendants allege that if under all equitable considerations Natural is entitled to a return or refund of any sums paid by it to Panoma, which is denied, that in equity and good conscience any amount which Natural might be entitled to recover should be reduced by the amount of the royalty payments paid by Panoma under the 7c order and under the 9.8262c order to its royalty owners and the extra production taxes paid to the State of Oklahoma, both of which were in excess of the payments which would have been so paid had the contract rate been in force and effect, as all such payments were made to preserve and protect the leasehold estate under which the gas reserves dedicated to Natural under the contract of December 1, 1946, were contained and from which the gas was produced which was delivered and sold to Natural, said preservation of the leasehold estate being for Natural's ultimate benefit and such payments to royalty owners and the State of Oklahoma should be offset against any recovery by Natural in this cause; and further that under all of the circumstances it would be against equity and good conscience to require Defendant to pay to Natural any

interest or any sum which Panoma might be required to refund or repay to Natural, said sums being held without benefit by Panoma.

XIX.

For further special answer Defendants allege the two-year statute of limitation of Texas (Art. 5526, Tex. Rev. Civ. Stat. 1925) in bar of each and all claims asserted by Plaintiff.

Wherefore, the Defendants pray that Plaintiff take nothing by reason of its Complaint and that the Defendants recover their costs herein.

HUGH L. UMPHRES, JR.,
(Hugh L. Umphres, Jr.),
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Amarillo, Texas.

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EXHIBIT NO. 1.

Panoma Corporation
Amarillo, Texas

August 19, 1952

Natural Gas Pipeline Company of America
20 North Wacker Drive
Chicago 6, Illinois

Re: Supplemental Sale of Gas Guymon-Hugoton Field.

Gentlemen:

As outlined in conversation with your representatives, we have entered into an agreement whereby Cities Service Gas Company, subject to certain conditions, are to return to us in the Guymon-Hugoton Field 10 billion cubic feet of gas in adjustment of 12,139,842 Mcf of gas (both volumes being measured at 16.4 p.s.i.a.) which we had heretofore delivered them from said field prior to our gas purchase contract with your company. Our understanding with Cities Service provides that such return of gas be at an average rate approximating 20 million cubic feet daily, subject to such reasonable variation as we may from time to time request.

It is now proposed that said gas volumes to be returned us by Cities Service under the aforesaid agreement shall be sold and delivered to you as hereinafter provided in order to supplement the present deliveries under our gas purchase contract, and this letter confirms the agreement between ourselves with respect to the sale and purchase of said gas upon the following terms and conditions, to-wit:

1. The gas volumes returned to Panoma by Cities Service under the aforesaid agreement will hereinafter be referred to as the "Cities Service gas". The existing gas purchase contract between ourselves dated December 1, 1946 will be referred to herein as the "purchase contract". The net volume of Cities Service gas metered into Natural's pipeline at the outlet of Panoma's gasoline plant after processing shall be referred to herein as the "supplemental sale volume".

2. The Cities Service Gas will be delivered and metered by Cities Service into the gathering pipelines of Panoma where it will be co-mingled with gas from Panoma's wells delivering gas under the purchase contract. Thereafter the co-mingled gas will be delivered to your Station 1 for compression, redelivered to Panoma's plant for dehydration and gasoline extraction, and after such treatment the remaining net volume of such co-mingled gas shall be delivered and metered into Natural's pipeline. It is agreed that all of the provisions of the purchase contract with respect to the delivery, pressure, quality, gasoline plant operation and metering of Panoma's present deliveries of gas shall apply to the processing and such delivery of said volumes of co-mingled gas to Natural.

3. Cities Service will furnish Panoma and Natural monthly statements showing the volume of gas metered into Panoma's gathering pipelines during the preceding fiscal months, which volume less six per cent (6%), (assumed and agreed upon as Panoma's pipeline loss, plant fuel and shrinkage) shall be considered hereunder as the supplemental sale volume for that month. In determining the volume sold and

delivered Natural under the terms of the purchase contract the supplemental sale volume shall be deducted from the aggregate monthly volume of co-mingled gas delivered by Panoma at the plant outlet metering station of Natural. Panoma shall invoice Natural for such supplemental sale volume each month at the same time it renders an invoice for the volume delivered that month under the purchase contract.

4. The total consideration to be paid Panoma by Natural for the supplemental sale volume delivered hereunder shall be Twelve and One-half Cents (12-1/2c) for each thousand cubic feet metered as provided in Article Twelfth of the purchase contract (16.4 pounds per square inch absolute pressure basis at 60 degrees base temperature), such amount to be adjusted in relation to the British thermal unit content of the gas in the manner specified in Article Sixth of the purchase contract, it being agreed that the average heating value determined each day for the co-mingled volume shall be applied to Panoma's total deliveries that day. Of the above consideration, 11c per thousand cubic feet at 16.4 pounds per square inch absolute pressure basis (being 9.8262c per thousand cubic feet at 14.65 pounds pressure basis) shall be the price for such gas, and the remainder shall be compensation for Panoma's services in gathering, dehydrating, and the delivery of said gas. Provided said price shall be no greater than the highest price which may be legally charged for such gas.

5. It is the essence of this agreement that the Cities Service gas be received by Panoma and redelivered Natural at a rate which will accomplish

the following two purposes: (a) the return of said 10 billion cubic feet of gas to Panoma over a period not in excess of two years from this date; (b) the delivery to Natural from Panoma of as even a quantity of gas each day throughout the calendar year as is practicable in good operation after giving consideration to the allowable status of Panoma's wells. To this end, and in consideration of Panoma's present allowables, the prior variations of its allowables in summer and winter periods, and the flexibility permitted by regulation in the production of allowables, it is agreed that the total deliveries shall not exceed 70 million cubic feet per day (measured at 16.4 p.s.i.a.) until and as often as representatives of Natural and Panoma shall meet and agree upon appropriate variation in such rate of delivery. It is the intent of this arrangement that the Cities Service gas be received at a rate which when used to augment Panoma's well allowables will provide as even a load factor for Natural over a two year period as it is practicable to obtain.

If the foregoing purchase agreement is acceptable to your company, please sign and return to us two copies of this letter whereupon it shall be a contract between our companies covering the purchase and sale of said gas volume.

Yours very truly,
PANOMA CORPORATION,
By (S.) DON HARRINGTON,
President.

DDH:W

Accepted and agreed to this 26th day of August, 1952.

NATURAL GAS PIPELINE
COMPANY OF AMERICA,
By (S.) J. J. HEDRICK,
President.

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## PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.

Filed November 28, 1955.

(Title Omitted.)

Plaintiff moves the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, to enter judgment for the plaintiff for the relief demanded in its complaint, on the ground that there is no genuine issue as to any material fact in this action, and that plaintiff is entitled to a judgment as a matter of law, as appears from the pleadings and the stipulation of counsel on file in this action, and the affidavits of J. G. Dickinson and Coleman Hayes, copies of which are attached hereto and made a part hereof; and the affirmative defenses contained in defendants' answer are insufficient as a matter of law.

Dated November 28th, 1955.

Respectfully submitted,
CLARENCE H. ROSS,
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122 South Michigan,
Chicago, Illinois.

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ROSS & O'KEEFE,
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D. H. CULTON,
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ROSS & O'KEEFE,
122 South Michigan Avenue,
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CULTON, MORGAN, BRITAIN & WHITE,
American National Bank Building,
Amarillo, Texas,
Of Counsel.

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## STIPULATION OF COUNSEL.

Filed November 28, 1955.

(Title Omitted.)

In order to conserve time and shorten the record, the parties to the above proceeding stipulate the following:

I.

The authenticity of the documents attached hereto as Exhibits 1 to 11, respectively, is admitted as if the original documents were produced and their au-

thenticity established by witnesses. The parties do not, however, stipulate as to the relevancy of such documents, or any of them, or their admissibility in evidence; the right to object to such documents on those grounds being expressly reserved. The documents so referred to are as follows:

1. Copy of Contract dated as of December 1, 1946, styled Gas Purchase Contract, between Natural Gas Pipeline Company of America (herein sometimes referred to as Natural) and Harrington & Marsh, attached hereto and marked Exhibit 1; amendment thereof, dated February 25, 1948, attached hereto and marked Exhibit 1-A; assignment thereof, dated October 1, 1948, from Harrington & Marsh to Panoma Corporation, attached hereto and marked Exhibit 1-B; amendment thereof, dated as of October 1, 1949, between Natural Gas Pipeline Company of America and Panoma Corporation, attached hereto and marked Exhibit 1-C.

2. Copy of Order No. 26096 of the Corporation Commission of the State of Oklahoma, entered in Cause CD No. 3628, on July 29, 1952, in a proceeding styled "In the Matter of the Application of Certain Mineral Owners in Texas County, Oklahoma, for an Order Determining the Minimum Price at Which Gas Produced from the Guymon-Hugoton Field may be first Purchased or Sold," attached hereto and marked Exhibit 2.

3. Copy of letter dated August 26, 1952, from Natural Gas Pipeline Company of America to Panoma Corporation, attached hereto and marked Exhibit 3; copy of reply thereto by Panoma Corporation dated

August 30, 1952, attached hereto and marked Exhibit 3-A; and copy of letter dated September 9, 1952 from Natural Gas Pipeline Company of America to Panoma Corporation, attached hereto and marked Exhibit 3-B.

4. Copy of letter dated June 25, 1954 from Panoma Corporation to Natural Gas Pipeline Company of America with consent of Natural indorsed thereon, attached hereto and marked Exhibit 4.

5. Copy of letter dated July 1, 1954, from defendants to Natural Gas Pipeline Company of America, attached hereto and marked Exhibit 5.

6. Copy of Opinion and Decree of the Supreme Court of Oklahoma in Cause 35731 dated April 27, 1954, attached hereto and marked Exhibit 6.

7. Copy of Opinion of the Supreme Court of the United States in Cause No. 321, October Term, 1954, dated April 11, 1955, attached hereto and marked Exhibit 7.

8. Copy of Mandate of the Supreme Court of the United States in Cause No. 321, issued May 20, 1955, attached hereto and marked Exhibit 8.

9. Order of the Federal Power Commission issued December 14, 1953, in its Docket No. G-2083, styled "In the Matter of Natural Gas Pipeline Company of America," attached hereto and marked Exhibit 9.

10. Copy of Decision of Trial Examiner issued January 27, 1955, in Docket No. G-2302, formerly pend-

ing before the Federal Power Commission, styled "In the Matter of Natural Gas Pipeline Company of America," attached hereto and marked Exhibit 10, together with order issued April 1, 1955, of the Federal Power Commission adopting in part such decision of the Trial Examiner, attached hereto and marked Exhibit 10-A.

II.

The following facts are stipulated:

1. On and prior to December 1, 1946, D. D. Harrington, Stanley Marsh, Jr., Estelle Fariss Marsh, T. J. Wagner, Jr., Ida D. Marsh, Isabel Marsh McCormick, and Stanley Marsh, Jr., as Independent Executor of the Estate of Stanely Marsh, deceased, comprised a partnership doing business under the firm name of Harrington & Marsh.

2. Said partnership was the owner of a large number of gas leases and gas purchase contracts covering land in Texas County, Oklahoma, together with certain gas producing wells, all of which were located in said Texas County, Oklahoma.

3. At and prior to such date, plaintiff herein was a natural gas company owning and operating a gas pipeline system extending from the State of Texas, through Oklahoma and other states, to points in Illinois and other states, to which it transported and at which it sold natural gas for resale for public consumption and gas to certain customers for their own use.

4. By Exhibit 1 attached hereto, dated as of December 1, 1946, said partnership, Harrington & Marsh, agreed to sell to Natural, and Natural agreed to purchase certain quantities of gas as set forth in said exhibit. In said contract sellers agreed to construct gathering lines for the purpose of collecting such gas from the wells and a gasoline extraction plant for the purpose of extracting liquids from such gas before delivering the residue to Natural at Natural's metering station. Natural agreed to construct a pipeline connecting its existing pipeline system with the gas reserves of said partnership at the point of delivery.

5. Following the execution of such contract, the facilities which sellers agreed to construct and the facilities which plaintiff agreed to construct were constructed and deliveries under such contract commenced in small quantities in August 1948, and substantial quantities in November 1948. Thereafter deliveries of gas under the contract continued.

6. On or about October 1, 1948, Panoma Corporation was created by the members of such partnership and the rights of such partnership under the contract were transferred to Panoma Corporation along with the leases, gathering line and gasoline plant.

7. The contract price basis of 6c per M.c.f. for the period ending July 1, 1951, based on a measurement of the gas at 16.4 pounds per square inch pressure, is equivalent to a price of 5.35974c when measured at 14.65 pounds per square inch. The contract price of 7c for a period of 5 years commencing July 1, 1951, is equivalent to 6.253c per M.c.f. when measured at 14.65 pounds pressure.

8. As of July 1, 1954, pursuant to an Agreement and Plan of Liquidation of Panoma Corporation, that corporation conveyed and assigned to the defendants herein, its sole and only stockholders at that time, certain assets, including the contract originally entered into between the partnership and Natural, in the following proportions:

D. D. Harrington—43,750/100,000ths.
Stanley Marsh, Jr.—31,016/100,000ths.
Estelle Fariss Marsh—2,734/100,000ths.
Isabel Marsh McCormick—10,000/100,000ths.
T. J. Wagner, Jr.—12,500/100,000ths.

9. Under such liquidation and distribution of the assets of Panoma Corporation to its stockholders (hereinafter referred to as "Harrington et al."), the stockholders received all of the assets of said corporation, the major portion of which assets, except for rights under the oil and gas leases as to formations below sea level, were simultaneously resold by them. Harrington et al., received from the properties so resold, in the percentages set forth in Paragraph 8 hereof, the sum of $40,000,000 in cash, plus other valuable considerations.

10. On January 18, 1949, Panoma Corporation advised Natural in writing to make all payments for gas delivered under the Gas Purchase Contract of December 1, 1946, to First National Bank and Trust Company of Oklahoma City (Oklahoma), Trustee for Panoma Corporation. On September 25, 1952, Natural transmitted to said Trustee a check covering the billing of Panoma Corporation for gas delivered under the contract during the month of August 1952, to-

gether with a letter dated September 25, 1952 (with copy to Panoma Corporation), a copy of which letter is attached hereto and marked Exhibit 11. Thereafter monthly checks for gas delivered were transmitted to said Trustee by similar letters, copies of which were sent to Panoma Corporation, until May 10, 1954, when Panoma Corporation advised that payments thereafter should be made to it. Monthly checks for gas delivered during the months of April, May and June, 1954, were made to Panoma Corporation, accompanied by similar letters.

Witness Our Hands this 18th day of November, 1955.

CLARENCE H. ROSS,
WARREN T. SPIES,
D. H. CULTON,
Attorneys for Plaintiff,

By (S.) WARREN T. SPIES.
HUGH L. UMPHRES, JR.,
DAVID T. SEARLS,
GENE F. WOODFIN,

By (S.) GENE M. WOODFIN.
Attorneys for Defendants,

* * * * * * * *

5. Exhibits attached to stipulation of counsel as follows:

(1) Exhibits 1, 1-A, 1-B and 1-C shall not be copied but in lieu of printing such exhibits, the following statement shall be printed:

"Exhibit 1 to the stipulation (pp. 41-86) is a contract, dated December 1, 1946, between Natural Gas

Pipeline Company of America (called "Natural") and D. D. Harrington, Stanley Marsh, Jr., Estelle Fariss Marsh, T. J. Wagner, Jr., Ida D. Marsh and Isabel Marsh McCormick, joined by her husband, and joined by Stanley Marsh, Jr., Independent Executor of the Estate of Stanley Marsh, Deceased, comprising a partnership doing business under the firm name of Harrington & Marsh, called "sellers." The contract contained, among others, provisions to the following effect:

(a) It recited that Natural was the owner of a natural gas transportation system originating near Gray, Oklahoma, and terminating near Joliet, Illinois, with a trunk lateral line traversing northern Illinois; that by means of said system it transported natural gas and sold and delivered the same for consumption in the Chicago Metropolitan Area and other localities, and might make deliveries for consumption in additional areas; that its system was integrated with a system called "Texoma," which originated in the Panhandle Field of Texas and connected with the origin of Natural's pipeline system; that Natural received from Texoma's system all gas then being transported and sold by it; that Natural and Texoma were then engaged under authorization of the Federal Power Commission under certificates theretofore issued in enlarging their respective transportation systems so that the integrated system would require on days of maximum operation an intake of approximately 340,000,000 cubic feet of gas daily; that Natural and Texoma has made applications to the Power Commission for a certificate permitting them to additionally enlarge such integrated system so that same would require an intake of approximately 470,000,000

cubic feet per day and intended to construct the facilities to obtain such additional enlargement of such integrated system; that Natural desired to obtain from sellers a certain proportion of its total system requirements and that the proposed expansion contemplated, among other things, a construction of a pipeline connecting Natural's pipeline system at its point near Gray, Oklahoma, with the gas reserves of sellers and the installation near the intake terminal of said pipeline of a compressor station and appurtenants for the compression of gas received from sellers; that all of such facilities would be adequate for handling 76,000,000 cubic feet of gas per day.

(b) Sellers represented that they owned leasehold estates, mineral interests, etc., covering in excess of 78,000 acres of land in Texas County, Oklahoma, in the Guymon-Hugoton Field, which vested in them the right to produce gas from such land, and that they desired to produce the gas underlying such reserves and sell the same to Natural; that they had completed a number of gas wells and proposed to drill additional wells and construct gathering lines connecting such wells to Natural's said Station No. 1 and install all other necessary facilities for the purpose of delivering gas to Natural under the terms of the contract; they they desired and would undertake to remove certain constituents of the gas to be delivered, after its compression by Natural, and for that purpose intended to construct a gasoline plant and dehydration plant on the pipeline to be constructed by Natural, on the discharge side of Station No. 1 (to be constructed for the compression of such gas so purchased).

(c) Natural agreed to expand its facilities in accordance with the proposal referred to, including the construction of pipelines and a compressor station as designated in the contract, and sellers agreed to drill wells, install gathering lines, construct gasoline dehydration plant and maintain their properties so as to make available for delivery to Natural the agreed quantities of gas.

(d) Gas would be delivered by sellers to Natural at the intake side of its compressor station and by Natural compressed and redelivered to sellers at sellers' gasoline plant, where sellers would remove certain constituents, including liquid hydrocarbons, and would then redeliver the residue gas to Natural at its meter station near the outlet side of sellers' plant, at which point title was to pass to Natural. Sellers were to sell and deliver to Natural such quantities of gas as would average as nearly as practicable 70,000,000 cubic feet daily, and in addition any quantities used for compressor station operation; and Natural was to pay for each 1,000 cubic feet of gas delivered to its measuring station at the following prices:

Until the 1st day of July, 1961— 6c

For the 5-year period commencing July 1, 1961:— 7c

And for the period commencing July 1, 1966, and continuing during the remaining term of the contract— 8c

All of these prices were based on measuring the gas at 16.4 pounds per square inch (equivalent to 5.3967c,

6.253c and 7.1463c, respectively, when applied to gas measured at 14.65 pounds). Further provision was made for increases and reduction in the price schedule in accordance with the varying B.t.u. content of the gas.

(e) Article Sixth, Subdivision 4, of such contract is as follows:

"4. Natural shall render to Sellers on or before the tenth day of each month a statement showing the total quantity of gas received into the integrated pipeline system of Natural and Texoma and the quantities of gas delivered hereunder by Sellers on each day during the calendar month next preceding, the average British thermal unit content of the gas delivered by Sellers each day of such calendar month, and shall accompany such statement with the applicable charts and such other data obtained or used by Natural for the preparation of such statement. Sellers shall within five (5) days after receipt of such statement render to Natural an invoice for the gas delivered hereunder during such calendar month and shall at the same time return to Natural all charts and data delivered to them with Natural's statement. Naural shall pay Sellers for the gas delivered during such calendar month within ten (10) days after receipt of invoice; and upon failure so to do, interest thereon shall accrue at the rate of six per cent (6%) per annum. If Natural should fail to pay any amount due hereunder, to the extent same is not in bona fide dispute, for a period of sixty (60) days after its due date, Sellers may suspend deliveries of gas hereunder until such payment is made. Any statement or invoice shall be subject to correction within one (1) year

after payment made by Natural for gas delivered during any calendar month, but if claim for correction is not made within that time, such statement and invoice shall become final as to both parties." And by Paragraph 5, Natural was authorized at its option to make payment of any sums by depositing same in the First National Bank & Trust Company, Oklahoma City, Oklahoma, to the credit of Harrington & Marah.

(f) By Article Fourteenth, the contract was made subject to present and future valid laws and present and future lawful orders of all regulatory bodies having jurisdiction over the parties, and it was provided that should at any time during the term of the contract either party by force of any such law or regulation imposed be ordered or required to do any act inconsistent with the provisions of the contract, the contract, subject to other provisions thereof, continue but be deemed modified to conform with the requirements of such laws or regulations.

(g) The term of the contract was to continue to January 1, 1965, and as long thereafter as sellers were able to deliver gas in paying quantities.

## EXHIBIT 1 TO STIPULATION.

Exhibit 1-A to the stipulation (pp. 87-89) is a letter supplementing the contract, dated February 25, 1948, which dealt with the point of delivery of gas used by Natural for compressor station operation, and the price therefor.

Exhibit 1-B to the stipulation (pp. 90-94) is an assignment dated October 1, 1948, by D. D. Harrington et al., composing the partnership doing business under the firm name of Harrington & Marsh, to Panoma Corporation (Panoma), of the gas purchase contract entered into by said partnership with Natural, as of December 1, 1946.

Exhibit 1-C to the stipulation (pp. 95-105) is an amendment to the contract, dated October 1, 1949, restating the gas reserves dedicated to the performance of the contract."

* * * * * * * *

(2) Exhibit 2 to the stipulation shall not be copied but in lieu thereof, the following statement shall be printed:

"Exhibit 2 to the stipulation (pp. 106-110) is a Report of the Corporation Commission of Oklahoma and Order No. 26,096, issued in Cause No. CD 3628 on July 29, 1952, fixing a minimum price for gas produced in the Guymon-Hugoton Field of Oklahoma. The decretal portion of said order is as follows:

'1. That no gas shall be produced from any well located in the Guymon-Hugoton Field of Oklahoma except at a price of not less than 9.8262c per thousand cubic feet if sold at the wellhead or on the lease or drilling unit from which produced, or a price equivalent to not less than 9.8262c per thousand cubic feet at the wellhead if sold off the lease or drilling unit or otherwise utilized. If the gas is sold during or upon conclusion of gathering without being processed

for the extraction of liquid hydrocarbons, the price shall be not less than 9.8262c per thousand cubic feet plus the reasonable cost of gathering. If the gas is processed for extraction of liquid hydrocarbons and sold during or at the conclusion of gathering, the price for the residue gas shall be not less than 2.8262c per thousand cubic feet.

'2. The minimum price specified above for the sale of residue gas after processing during or upon conclusion of gathering contemplates that said residue gas will contain at least 950 British Thermal Heating Units per cubic foot of gas saturated with water vapor at standard conditions. In the event such residue gas contains less British Thermal Heating Units than specified above, the minimum price for such gas shall be in the proportion that the British Thermal Heating Units of such gas is to 950 per cubic feet.

'3. For the purpose of this order a cubic foot of gas shall mean a volume of gas contained in one cubic foot of space measured at a pressure of 14.65 pounds per square inch absolute at a temperature of sixty degrees Fahrenheit (60 F.).

'4. This order shall become and be effective the 1st day of August, 1952.'"

• • • • • • • •

## EXHIBIT 3 TO STIPULATION.

Natural Gas Pipeline Company of America
20 N. Wacker Drive
Chicago 6, Illinois

Phone RAndolph 6-0278—L.D. 411

August 26, 1952

Panoma Corporation
Amarillo, Texas

Gentlemen:

By Order No. 26096, entered in Cause CD No. 3628 on July 29, 1952, effective on and after August 1, 1952 (the enforcement of which order was stayed until September 10, 1952 by the Commission's Order No. 26111 entered July 31, 1952), it is required, among other things, that no gas shall be produced from the Guymon-Hugoton Field of Oklahoma except at a price of not less than 9.8262c per thousand cubic feet if sold at the wellhead, and that if the gas is processed for extraction of liquid hydrocarbons and sold during or at the conclusion of gathering, the price for the residue gas shall be not less than 9.8262c per thousand cubic feet; volumes to be measured at a pressure of 14.65 pounds per square inch absolute and at a temperature of 60 degrees Fahrenheit.

You have informed us that you interpret such order as applying to the gas sold by Panoma to this Company under contract entered into between Don Harrington, et al., as sellers, and Natural Gas Pipeline Company of America, as buyer, dated as of December 1, 1946, as amended; and have also informed us

that, unless payments be made by us at the minimum price set forth in such order (instead of the price set forth in such contract), you will discontinue the delivery of gas produced by you in the Guymon-Hugoton Field in Oklahoma to us in accordance with the provisions of such contract of December 1, 1946, as amended.

Natural denies that such order can lawfully be applied to the gas so purchased by it from you under such contract of December 1, 1946, as amended. It has filed a notice of appeal from such Order No. 26096, and will prosecute that appeal and litigate the validity of that order as applied to the gas which Natural purchases from Panoma under such contract of December 1, 1946, as amended.

Pending final adjudication as to the validity of such order as applied to the gas so purchased by Natural from Panoma under such contract, it is necessary that the gas which you have agreed by such contract to sell and deliver to Natural be delivered to it in order that Natural may fulfill its obligations to its customers and thus provide supplies of gas in the consuming areas to which Natural transports gas in accordance with its certificates of public convenience and necessity. It is impossible for Natural to replace such gas, during the pendency of such proceedings, with gas from any other sources, on any reasonable basis.

Natural's rights and the rights of the consuming public to which it supplies gas cannot be adequately protected through the filing of a supersedeas bond. Natural fully recognizes that, in the event such Commission order is held valid and applicable to the gas which is sold to Natural under such contract, the price provisions of such contract will be adjusted to con-

form to such order. It is necessary, in the public interest as well as in the interest of Natural, that Natural's dedicatory rights under such contract of December 1, 1946, as amended, be fully protected and preserved pending the appeal from such order.

Natural will, therefore, each month, upon receipt of proper accounting statements, pay in accordance with the contract price and, in addition thereto, will make payments for the difference between such contract price and the price fixed by the Commission for such gas in said order.

Payments of all sums in excess of the contract price, however, will be made involuntarily and under protest because of the compulsion and coercion resulting from the threat of the order itself and your interpretation of such order as prohibiting you from producing and delivering such gas to Natural under said contract at a price less than the minimum price fixed by the Commission in such order.

You will understand, of course, that each payment of such difference is and will be made involuntarily and under protest without an express repetition of the protest and the grounds thereof at the time of each payment. In the event such order shall be held invalid or inapplicable to the gas sold and delivered by you to us under such contract, Natural will assert the right under familiar doctrines of business compulsion, unjust enrichment and restitution to a return to Natural of the additional payments so made under protest, with lawful interest thereon.

It is suggested, however, that by agreement, such additional amounts to be paid by us monthly for your account into the ..... Bank of ....., to be held by that bank in escrow under the following stipulations:

(1) That in the event such order shall finally be held valid and applicable to gas so delivered to Natural by Panoma under such contract, the sums so held in escrow shall be released to Panoma.

(2) That in the event such order shall finally be held invalid or inapplicable to gas so delivered by Panoma to Natural under such contract, the sums so held in escrow shall be returned to Natural.

(3) That, since neither party will have the use of the money while it is so held in escrow, all interest or claims for interest shall be waived.

If the above provisions as to an escrow of the additional amounts so paid by Natural are agreeable to you, you may indicate your acceptance thereof by your indorsement on the bottom of this agreement, and a signed copy hereof will be placed in such bank for its guidance.

Yours very truly,
NATURAL GAS PIPELINE
COMPANY OF AMERICA,
By J. J. HEDRICK.

Accepted this ... day of ....., 1952.
PANOMA CORPORATION,
By .....

## EXHIBIT 3-A TO STIPULATION.

Panoma Corporation
701 First National Bank Building
Amarillo, Texas

Don D. Harrington
President

August 30, 1952

Mr. J. J. Hedrick, President
Natural Gas Pipeline Company of America
20 North Wacker Drive
Chicago 6, Illinois

Dear Joe:

Pursuant to your request during our recent visit in Amarillo, I have submitted your proposed letter of agreement dated August 26th to our attorneys in Oklahoma City for their recommendation and advice. Mr. T. Murray Robinson who is most familiar with the matter is unfortunately on vacation until the end of next week; however, his associates are definitely of the opinion that it would be contrary to the interests of Panoma to agree to the suggested escrow arrangement. They preferred, however, that Robinson return before stating their objections in writing or arranging a meeting with your attorneys, should that be desired.

From our standpoint we fail to see how the proposal would be of any help to our situation. If you contest the order we must furnish a supersedeas bond and after the litigation is finally concluded have the burden of accounting to several hundred royalty owners and the joint owners of minor operating interests

for the monthly gas volumes at the difference in price plus 6% interest to be calculated on each monthly item. We have been through it for the past four years in connection with the original minimum-price order and know what a job it is. Also we will never know where we are as to our income tax situation until the issue is finally adjudicated.

While we feel that the present order will undoubtedly be sustained by the Courts as was the prior order, we certainly would like to resolve the matter by negotiation if possible and avoid the accounting difficulties and expense of litigation with which we otherwise will both be faced. In order to end this controversy we would appreciate your giving consideration to the following proposal:

(a) That we enter into a revised gas purchase contract as of August 1, 1952, containing substantially the same provisions of our present instrument except that the price be 9.8262c per mcf at 14.65 psia for five years, then for the following five year period and each subsequent five year period a fair and reasonable price at the time as determined by negotiation or arbitration.

(b) In consideration of said contract revision we would agree to revise our Supplemental Sale Agreement of August 19, 1952, to provide that the 10 billion cubic feet of gas to be returned us by Cities Service shall also be delivered you at said price of 9.8262c per mcf at 14.65 psia rather than the 12½c per mcf now specified.

We would appreciate your advising us your decision on the above proposal as soon as convenient

in order that we may plan how to proceed at the September 10th hearing before the Commission. Also we are holding up our report to the O.P.S. with respect to the supplemental sale of the Cities Service gas until it is determined whether or not something can be worked out in the manner we have suggested.

With best personal regards, I am,

Yours very truly,

DON D. HARRINGTON,

(Don D. Harrington).

DDH:W

(5) Exhibit 3-B to the stipulation (pp. 113-115) shall not be printed but, in lieu thereof, the following statement with reference thereto may be printed:

"Exhibit 3-B to the stipulation is a letter of Natural Gas Pipeline Company to Panoma Corporation, dated September 9, 1952, a copy of which is attached to the complaint as Exhibit A."

* * * * * * * *

# EXHIBIT 4 TO STIPULATION.

June 25, 1954

Natural Gas Pipeline Company of America
20 North Wacker Drive
Chicago (6), Illinois

Attn.: Mr. J. J. Hedrick, President and General Manager.

Gentlemen:

Reference is made to the Gas Purchase Contract between Natural Gas Pipeline Company of America (Natural) and Harrington and Marsh (Sellers), dated as of December 1, 1946 (herein called the Gas Purchase Contract), relating to the purchase and sale of specified quantities of natural gas produced from certain lands in Texas County, Oklahoma.

The undersigned and the other stockholders of Panoma Corporation, which has succeeded Harrington and Marsh as a party to the Gas Purchase Contract, propose to cause the dissolution and liquidation of said corporation and upon such liquidation undivided interests will be assigned to the stockholders in the properties to which the Gas Purchase Contract relates in the same proportions as their ownership of the stock of Panoma Corporation.

Such owners propose thereafter to assign to Dorchester Corporation all of their interests in the plants, pipeline gathering system and other facilities referred to in the Gas Purchase Contract subject to a Processing Agreement requiring the purchaser to operate said plants and the other properties in accordance with the provisions of the Gas Purchase Contract.

To provide for the payment in part of the purchase price Dorchester Corporation will execute and deliver Mortgages and Deeds of Trust to Donald Scott, Jr., as Trustee, and to Hughes Seewald, as Trustee.

Such owners also propose thereafter to assign to Nalam Corporation their interests in the Gas Reserves referred to in the Gas Purchase Contract insofar as said interests cover producing horizons situated in whole or in part above sea level, reserving, however, in addition to their interests in horizons below sea level a deferred production payment. Such assignment will also include the rights of such owners under applicable contracts insofar as they relate to the interests assigned. The leasehold interests and contract rights so assigned are herein called the Oklahoma Properties. The instrument of assignment will also include other interests and rights, which together with the Oklahoma Properties, are herein called the Properties.

The undersigned is informed by Nalam Corporation that it proposes (a) to assign the Properties under a Mortgage and Deed of Trust to First National Bank in Dallas, as Trustee, as security for loans from Metropolitan Life Insurance Company and The Mutual Life Insurance Company of New York, (b) to sell the Properties (subject to said Mortgage and Deed of Trust) to Dorchester Corporation reserving a production payment, and (c) to sell said production payment (subject to said Mortgage and Deed of Trust) to Cortez Oil Corporation.

You have been furnished with proofs of the proposed assignments, Mortgages and Deeds of Trust and Processing Agreement above referred to. It is proposed that at the time such instruments are delivered in final form conformed copies of each of such instru-

ments will be mailed to you and that there will also be mailed to you a duly executed instrument of assumption in the form annexed hereto as Exhibit A. It is presently contemplated that all such instruments will be delivered on July 1, 1954 but that such delivery date may possibly be deferred, in which case all of such instruments, including the instrument of assumption, will be dated as of the date of delivery and be made effective as of 10:00 o'clock A.M. C.S.T. on such date.

By signing the confirmation at the foot of this letter, Natural confirms to D. D. Harrington and to the other stockholders who will become the distributees of Panoma Corporation, to Dorchester Corporation, to Nalam Corporation and each of its assigns referred to above, that, subject to the execution and delivery of said instrument of assumption, Natural consents to each of the assignments of the rights and benefits of the Sellers and/or their successors in interest under the Gas Purchase Contract, upon the conditions (i) that such assignments and the assumption of the assignees thereunder shall not impair the continuing obligation to Natural of the Sellers, as defined in the Gas Purchase Contract, for the full and complete performance of the Gas Purchase Contract or waive the liability, if any, of the Sellers and/or their successors in interest for past failure of performance thereunder, and (ii) that the transactions described above are consummated by September 1, 1954; and further provided that the instruments of assignment and the other substantive instruments of the transaction are subsantially in the respective forms of the proofs provided to Natural, as identified by the initials of representatives of Natural and the Sellers.

This consent is executed (i) upon the condition that it shall not be construed as a concurrence by Natural in any assumptions of fact which may underlie the execution of said assignments or of any or all of the other substantive instruments involved in the transaction, and (ii) without prejudice to Natural's right to take any position or assert any right which Natural might have taken or asserted prior to the execution of this consent which does not limit the effect of the consent to the extent it is required. No approval of any of the substantive instruments concerned in this transaction or the recitals therein shall be implied from this consent, except to the extent that consent is required under Secion 3 of Article Eighteenth of the Gas Purchase Contract to permit the consummation of the proposed transaction.

Natural hereby waives its option to purchase granted under Article Seventeenth of the Gas Purchase Contract with respect to each of the transactions referred to above, provided that the transactions described above are consummated by September 1, 1954. It is expressly stipulated, moreover, that such confirmation by Natural shall not impair any rights which Natural may have against any person, firm or corporation to recover the difference between the contract price and the price actually paid by Natural by reason of minimum price orders for gas delivered under the Gas Purchase contract by such person, firm or corporation.

As the consent of Natural is not required for the pledging of all or any portion of the Sellers' property covered by the Gas Purchase Contract as security under any Mortgage, Deed of Trust or other similar lien, or for pledging the Gas Purchase Contract or any benefits accruing thereunder to the party making

the pledge, Natural has not consented thereto, though if each such pledge, Mortgage, Deed of Trust or similar lien were not made subject to the terms of the Gas Purchase Contract, such consent would, in the opinion of Natural, be necessary.

Very truly yours,
D. D. HARRINGTON,
(D. D. Harrington).

Confirmed: June 28, 1954.

NATURAL GAS PIPELINE COMPANY OF AMERICA,
By J. J. HEDRICK,
President.

(7) Exhibit A attached to Exhibit 4 to the stipulation shall not be printed, but in lieu thereof the following statement shall be printed:

"Exhibit A atached to Exhibit 4 styled 'Instrument of Assumption,' dated July 1, 1954, recites that, as of said date, Panoma Corporation was dissolved, and its properties, including the gas purchase contract, distributed in liquidation to the following persons in the following proportions:

D. D. Harrington—43,750/100,000ths.
Stanley Marsh, Jr.—31,016/100,000ths.
Estelle Fariss Marsh—2,734/100,000ths.
Isabel Marsh McCormick—10,000/100,000ths.
T. J. Wagner, Jr.—12,500/100,000ths.

It also recites that the distributees have assigned to Dorchester Corporation certain of the properties cov-

ered by the gas purchase contract and states that the distributees are to satisfy the gas purchase contract as to the properties covered thereby retained by them and that Dorchester is to satisfy the gas purchase contract so far as it relates to the properties conveyed to them."

EXHIBIT 5 TO STIPULATION.

July 1, 1954

Natural Gas Pipeline Company of America
20 North Wacker Drive
Chicago 6, Illinois

In Re: Order No. 26096 of the Oklahoma Corporation Commission entered in Cause CD 3628 on July 29, 1952.

Gentlemen:

The undersigned constitute all of the stockholders of Panoma Corporation as they existed prior to July 1, 1954, at 10:00 o'clock A.M. Central Standard Time, as of which hour and date Panoma Corporation transferred all of its assets to such stockholders. The undersigned are thereafter conveying certain of the properties received in liquidation, including those subject to that certain Gas Purchase Contract dated as of December 1, 1946, between Natural Gas Pipeline Company of America and Harrington & Marsh (previously assigned to Panoma Corporation), except as to the gas reserves covered by said contract found in horizons situate below sea level.

Please refer to letter of September 9, 1952, from you to Panoma Corporation, in which you stated that

you were paying under protest the price, to the extent in excess of the contract price, required by the order of the Corporation Commission of Oklahoma, No. 26096, effective on and after August 1, 1952, as to gas delivered under the contract.

It was understood that your execution and delivery of a certain instrument dated June 25, 1954, consenting to the assignment of the Gas Purchase Contract from Panoma Corporation to us, and from us to third persons, was contingent upon your obtaining the following agreement upon our part, to-wit:

That we hereby jointly and severally agree on behalf of ourselves, our executors, administrators and assigns to pay you or cause to be paid you any sums of money with lawful interest thereon which you are entitled to have refunded or returned with respect to the payments to Panoma Corporation in excess of the contract price made under protest referred to in said letter of September 9, 1952. We do also jointly and severally, for ourselves, our heirs, executors, administrators and assigns agree to and do hereby acknowledge and assume any obligations imposed upon Panoma Corporation by virtue of the letter you addressed to it under date of September 9, 1952.

Very truly yours,

D. D. HARRINGTON,
(D. D. Harrington),
STANLEY MARSH, JR.,
(Stanley Marsh, Jr.).
ESTELLE FARISS MARSH,
(Estelle Fariss Marsh),
ISABEL MARSH McCORMICK,
(Isabel Marsh McCormick),
T. J. WAGNER, JR.,
(T. J. Wagner, Jr.).

## EXHIBIT 6 TO STIPULATION.

(9) In lieu of printing Exhibit 6 to the stipulation (pp. 124-147), the following statement with reference thereto may be printed:

"Exhibit 6 to stipulation is a copy of the opinion of the Supreme Court of Oklahoma affirming the order of the Corporation Commission of Oklahoma (Exhibit 2 to the stipulation). Said opinion is reported in 272 P. 2d 425."

* * * * * * * *

## EXHIBIT 7 TO STIPULATION.

99 L. ed (Advance p. 472)

April 11, 1955

Per Curiam Decisions.

No. 191. Natural Gas Pipeline Company of America, Appellant, v. Panoma Corp., and Corporation Commission of the State of Oklahoma; and

No. 321. Natural Gas Pipeline Co. of America, Appellant, v. Corporation Commission of the State of Oklahoma, et al.

Appeals from the Supreme Court of Oklahoma.

April 11, 1955. Per Curiam: In these cases Oklahoma has attempted to fix a minimum price to be paid for natural gas, after its production and gathering has ended, by a company which transports the gas for resale in interstate commerce. We held in

Phillips Petroleum Co. v. Wisconsin, 347 US 672, 98 L. ed. 1035, 74 S. Ct. 794, that such a sale and transportation cannot be regulated by a state but are subject to the exclusive regulation of the Federal Power Commission. The Phillips case, therefore, controls this one.

We disagree with the contention of the respondents that Cities Service Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 179, 95 L. ed. 190, 71 S. Ct. 215, and Phillips Petroleum Co. v. Oklahoma, 340 U.S. 190, 95 L. ed 204, 71 S Ct. 221, are applicable here. In those cases we were dealing with constitutional questions and not the construction of the Natural Gas Act. The latter question was specifically not passed upon in those cases. Reversed.

Mr. Justice Douglas, being of opinion that state regulation of price is permissible under the Federal price regulation permitted by Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672, 98 L. ed. 1035, 74 S. Ct. 794, is imposed, dissents.

Mr. Justice Harlan took no part in the consideration or decision of these cases.

* * * * * * * *

## EXHIBIT 9 TO STIPULATION.

(11) In lieu of printing Exhibit 9 to the stipulation (pp. 153-157), the following statement with reference thereto may be printed:

'Exhibit 9 to the stipulation is a copy of an order of the Federal Power Commission adopted Decem-

ber 9, 1953, in Docket G-2083, finding that increased rates provided for in Natural's revised rate schedule filed October 1, 1952, were reasonable and that they should be effective as of April 1, 1953. The order contains the following recital:

'During the hearing Natural stated that in the event it finally prevails in its suit now pending in the District Court of Travis County, Texas, wherein it is contesting the validity of the Texas Gas Gatherers Tax, which tax it is paying under protest, it will refund to its utility customers, on a basis to be approved by the Commission, sums recovered thereunder. We shall designate this statement as Commitment No. A. In addition, Natural stated that should it be successful in its appeal of the order of the Oklahoma State Corporation Commission entered on July 29, 1952, in Cause CD-3628, under which Natural has, under protest, paid to Panoma Corporation (Panoma) 9.8262c per Mcf for all residue gas purchased from Panoma subsequent to August 1, 1952, under its contract with Panoma dated December 1, 1946, and shall thereafter by virtue of a final decree in the aforesaid litigation or appropriate proceeding instituted against Panoma recover any sum or sums of moneys so paid to Panoma under protest, it will refund to its utility customers, on a basis to be approved by the Commission, the sum or sums so recovered. We shall designate this statement as Commitment No. B. Further, Natural stated that in the event in filing its Federal income tax for the year 1953, it should claim and be allowed depreciation on the adjusted income tax basis for its main transmission plant at a rate in excess of 3-½% per annum, it will refund to its utility customers, on a basis to be approved by the Commission,

any income tax saving that may accrue to it as a result of claiming and being allowed any such depreciation rate in excess of 3-½% per annum on its main transmission plant. We shall designate this statement as Commitment No. C.'

"Subdivision (B) of the decretal portion of such order is as follows:

'(B) Natural shall report to the Commission, immediately upon the occurrence thereof, the final results of all the litigation referred to in said Commitments Nos. A and B, or arising therefrom, and shall report whether, in filing its Federal income tax return for the year 1953, it claimed or was allowed depreciation on the adjusted income tax basis for its main transmission plant at a rate in excess of 3½%. In case the events set forth in said Commitments Nos. A, B, and C, or any one of them, occur, Natural shall submit to the Commission for its approval five copies of a plan in writing, setting forth a detailed statement of the amount of each proposed refund pursuant to said Commitments; to whom the refund is proposed to be made and method of computation thereof; and a showing, in the event the proposed recipient is a utility customer, that such utility customer is entitled to receive and retain the proposed refund, together with a full explanation and justification for any deduction for taxes, or otherwise, therefrom.' "

(13) In lieu of printing Exhibit 10-A (pp. 179-187) to stipulation, the following statement with reference thereto may be printed:

"Exhibit 10-A. This exhibit is copy of an order of the Federal Power Commission dated March 30, 1960, permitting certain increased rates of Natural to become effective. Paragraph (C) of such order is as follows:

'(G) In the event Natural shall receive any refunds (a) from Texas Illinois on account of that company's controversy with the LaGloria Area Operators, (b) from Panoma Corporation, or (c) from Colorado Interstate Gas Company, or any of them, on account of Natural gas delivered by any of the said three companies, Natural forthwith upon receipt of any such refund shall submit to the Commission for its approval five copies of a plan in writing, setting forth a detailed statement of the amount of each proposed refund; to whom the refund is proposed to be made and method of computation thereof; and a showing in the event the proposed recipient is a utility customer, that such utility customer is entitled to receive and retain the proposed refund and Natural shall file with the Commission any further changes in its FPC Gas Tariff, First Revised Volume No. 1, or any superseding volume, which may become necessary and appropriate, by any reduction of rates and charges of said three companies.'"

* * * * * * * *

## EXHIBIT 11 TO STIPULATION.

Natural Gas Pipeline Company of America
20 N. Wacker Drive
Chicago 6, Illinois
Phone RAndolph 6-0278—L.D. 411

September 25, 1952

First National Bank and Trust Company
of Oklahoma City
Trustee for Panoma Corporation
Oklahoma City, Oklahoma

Attention: Mr. A. N. Murphy, Vice-President.

Gentlemen:

We are transmitting herewith, in accordance with the letter of instructions of Panoma Corporation to us dated January 18, 1949, directing that all payments for gas deliveries under that certain gas purchase contract between Panoma Corporation and ourselves (dated as of December 1, 1946) be made direct to you, our Check No. 5866 in the sum of $159,348.64 covering the billing of Panoma Corporation for all gas sold to Natural Gas Pipeline Company of America during the month of August, 1952.

Such payment is, as to any part thereof in excess of that payable under the price provisions of said contract, made involuntarily and under protest with full reservation of all rights to seek restitution thereof as is more particularly set forth in our letter to Panoma Corporation dated September 9, 1952, a copy of which is attached hereto for your information.

Very truly yours,
NATURAL GAS PIPELINE
COMPANY OF AMERICA,

By J. J. HEDRICK,
President.

end: copy of letter to Panoma Corporation dated 9/9/52.
cc: Panoma Corporation w/o enc.

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Filed: November 28, 1955.

Dated November 25, 1955.

United States District Court for the Northern District of Texas, Amarillo Division.

Natural Gas Pipeline Company of America, a Corporation, Plaintiff,

v. Civil Action No. 2070.

D. D. Harrington, Stanley Marsh, Jr., Estelle Fariss Marsh, Isabel Marsh McCormick and T. J. Wagner, Jr., Defendants.

Affidavit of J. G. Dickinson.

J. G. Dickinson, being first duly sworn, deposes and says:

I am 61 years of age and reside at Amarillo, Texas. I am Vice President in Charge of Production for Natural Gas Pipeline Company of America (hereinafter referred to as Natural), and its affiliated companies. I have had since the year 1930 direct control and supervision over the production of gas from gas reserves owned by Natural and its predecessor company. Additionally, I have had direct control and

supervision over the purchase of gas by Natural from producers thereof. I am familiar with the contract dated as of December 1, 1946, between Harrington &Marsh and Natural (later assigned by Harrington & Marsh to the Panoma Corporation), providing for the deliveries of gas produced in the Guymon Field in Oklahoma after the extraction of liquefiable hydrocarbons therefrom. I participated in negotiations that resulted in the execution of the contract. I am familiar with the gas reserves covered by said contract and deliveries of gas under such contract and have been charged with the responsibility for the operation of said contract on the part of Natural. My duties in relation to the purchase of gas by Natural have given me familiarity with the sources of gas available to Natural's pipeline system. I am also familiar with the impact of the cost of gas on the rates charged or allowed to be charged by Natural on the resale of gas under the regulation thereof imposed under the Natural Gas Act.

On August 1, 1952, and thereafter the gas deliverable under Natural's said contract constituted a substantial portion of Natural's source of supply. It would have been impossible for Natural to replace during the pendency of Natural's appeal from said order the volumes of gas which Panoma was required by the contract to deliver at any reasonable price.

The facts set forth herein are within the personal knowledge of affiant.

(S.) J. G. DICKINSON.

Subscribed and Sworn to before me this 25th day of November, 1955.

(S.) GWENDOLYN MARTENS,
Notary Public, Potter County, Texas.

(Seal)

(Title Omitted.)

Filed: November 28, 1955.

Dated November 18, 1955.

## Affidavit of Coleman Hayes.

State of Oklahoma,
County of Oklahoma. ss.

Coleman Hayes, first being duly sworn, deposes and says:

I am 52 years of age. I reside at Oklahoma City, Oklahoma. I am by profession an attorney. I have been engaged in the practice of law in the State of Oklahoma for more than 29 years last past.

I represented Natural Gas Pipeline Company of America (hereinafter called Natural) in a certain proceeding before the Corporation Commission of Oklahoma styled "In the Matter of the application of Certain Mineral Owners in Texas County, Oklahoma, for an Order Determining the Minimum Price at which Gas Produced from the Guymon-Hugoton Field may be first Purchased or Sold," the same being Cause CD 3628 of that Commission; said proceeding resulted in Order No. 26096 of said Commission dated July 29, 1952, and effective August 1, 1952. Said order, among other things, fixed a minimum price for gas produced in the Guymon-Hugoton Field and sold after the extraction of liquid hydrocarbons therefrom. I also represented Natural in its appeal from said order, first to the Supreme Court of Oklahoma and from that Court to the Supreme Court of the United States.

In such proceeding before said Commission Mr. T.

Murray Robinson, an atterney at law of Oklahoma City, Oklahoma, appeared for the applicants. After the entry of said order No. 26096, the said Robinson on behalf of Panoma Corporation (hereinafter referred to as Panoma) discussed with affiant the impact of said order on the price of gas under the contract pursuant to which Panoma was then selling and delivering to Natural residue from gas produced in the Guymon-Hugoton Field.

After such order was entered and prior to September 10, 1952, Mr. Robinson, acting as counsel for Panoma, had informed affiant, in substance and in effect, that Panoma would comply with Order No. 26096 if not superseded or honored by Natural according to its tenor, and if Natural did not supersede the order or pay the price fixed by the order, Panoma would discontinue the delivery of gas under the contract.

A hearing in said Cause No. CD 3628 was set before the Corporation Commission on September 10, 1952, to consider any supersedeas bonds that might be tendered by any of the parties to the proceeding in connection with an appeal from said order. At that hearing Mr. Robinson advised the Commission that he was familiar with the situation as far as Natural was concerned and that it was going to comply with the order. In order that there might be no misunderstanding concerning Natural's position, affiant then stated to the Commission that Natural intended to appeal from the order; that Panoma had threatened that, upon Natural's failure to pay for gas delivered under the contract at the price fixed by the order, deliveries of gas thereunder would be cut off; that in view of this statement and in view of the coercion of the order itself, Natural intended to pay the price fixed by the order, but under protest and with a full reservation of all rights under such protest, including a

claim for restitution in the event the order be reversed. Affiant then asked Mr. Robinson to state for the purpose of the record if that was substantially his understanding of the situation; Mr. Robinson stated that it was.

Affiant has requested reporters for the Corporation Commission to make a diligent search for a record of the hearing of September 10, 1952, and has been advised that none has been found; that if the reporter of the Commission (since deceased) took any notes at the hearing it now appears they have been lost or destroyed.

The facts herein set forth are within affiant's personal knowledge. While the exact language used cannot at this time be detailed, the substance and effect are as herein stated.

(S.) COLEMAN HAYES.

Subscribed and sworn to before me this 18th day of November, 1955.

(S.) MARY JO DUCKETT,
Notary Public, Oklahoma
County, Oklahoma.

(Seal)

My Commission Expires: March 25, 1957.

(Title Omitted.)

Filed: January 6, 1956.

Dated December 23, 1955.

## Supplemental Affidavit of Coleman Hayes.

State of Oklahoma,
County of Oklahoma. ss.

Coleman Hayes, being duly sworn, deposes and says:

I am the same Coleman Hayes who on the 18th day of November, 1955, made an affidavit in the above entitled cause. Therein I referred to a hearing which was held in Cause CD No. 3628 on the 10th day of September, 1952, and stated that the reporters for the Corporation Commission of the State of Oklahoma had been unable, though requested by affiant so to do, to locate any notes or recordings of the proceedings at such hearing. Since that date Roy K. Kerbow, a reporter for the Corporation Commission, has found a Soundscriber disc on which material portions of said hearing were recorded, and by use thereof has prepared a transcript, a copy of which is attached hereto, marked Exhibit "A", and made a part of this affidavit. Such exhibits is attached because of the prior reference to affiant's inability to obtain the same, and also to substantiate the substance of the previous affidavit.

Affiant further says that his attention has been directed to Paragraph 5 of the First Amended Answer of defendants herein which is as follows:

"The Defendants deny the allegations contained in Paragraph 5 of the Plaintiff's Complaint; Panoma did not at any time threaten or inform Natural that it would discontinue any delivery of gas to Natural; but on the contrary, after said Order specifying the price of not less than 9.8262c per thousand cubic feet was entered on July 29, 1952, and made effective as of August 1, 1952, that thereafter sales and deliveries were made to Natural by Panoma without knowledge as to whether Natural would pay the price specified in such Order until Panoma received the letter of September 9, 1952 (Exhibit A to Plaintiff's Complaint)."

In this connection affiant says that the enforcement of Order No. 26096 entered in Cause CD No. 3628 was stayed by Order No. 26111 entered in said cause on July 31, 1952, until September 10, 1952, at 10:00 o'clock A.M. A duly certified copy of said Order No. 26111 is attached hereto, marked Exhibit "B" and made a part hereof.

Further affiant saith not.

COLEMAN HAYES.

Subscribed and sworn to before me this 23rd day of December, 1955.

MARY JO DUCKETT,
Notary Public.

(Seal)

My Commission Expires: March 25, 1957.

## EXHIBIT "A".

Before the Corporation Commission of the State of Oklahoma.

In Re: In the Matter of the Application of Certain Mineral Owners in Texas County for an Order Determining the Minimum Price at which Gas Produced from the Guymon-Hugoton Field may be First Purchased or Sold. Hearing Set for the Purpose of Determining any dispute, if any, relating to the Terms, Conditions and Amounts of Bonds.

Cause CD No. 3628.

### Transcript of Proceedings.

Transcribed from Sounscriber recorder only by Roy K. Kerbow, Court Reporter, Corporation Commission of Oklahoma.

The above entitled and numbered Cause came on for hearing before the Corporation Commission of Oklahoma on the 10th day of September, 1952.

The Commission was in session, with the Honorable Reford Bond, Chairman, Ray O. Weems, Vice-Chairman, and Ray C. Jones, Commissioner, sitting.

The Cause was called for hearing, and proceedings were continued as follows:

Chairman Bond:
Gentlemen you may enter your appearances in CD-3628.

Mr. Robinson:

T. Murray Robinson appearing for the Mineral owners in Texas County.

Mr. Hayes:

Coleman Hayes for the Natural Gas Pipe Line Company.

Mr. Robinson:

As I understand it, Your Honor, this is set down for a determination of the conditions and the amounts of supersedeas bonds which may be executed by the various purchasers who wish to stay the effectiveness of this Order. I have worked out an agreement with Northern Natural, I think it is, and whether or not, I signed a stipulation but as to whether or not that has been filed by the company, or not, I don't know. I agreed with them as to the form and to the amounts which certain bonds they were to file. No other company has approached me, as representing the royalty owners, to try to work out an agreement for the amount of the bonds. I think the rest of them are just going to comply and obey the Order in the meantime. So I don't know as there is anything further to be done on today's docket, unless Mr. Williams has some matter he wishes to take up with the Commission. I happen to know about Mr. Hayes' clients, because I have seen an exchange of letters between the principals involved, and by the exchange of those letters I understand that they're going to ..... I'm sure they are, if they don't put up a bond today.

Mr. Hayes:

Maybe I can just make a short explanation here. The only purpose of my being here is because I understood, as did Mr. Robinson, that this matter was set

so that if controversies had arisen in connection with the terms and provisions of the bonds, that the Commission might decide it. I can tell you what Natural Gas Pipe Line Company of America is going to do, and from what Mr. Robinson tells you, he's aware of it, and that is, under the compulsion of the Order itself and by reason of the stress of Panoma from whom Natural purchases it's residue gas, that unless payment is made at the price fixed in the Order they will cut off our gas, notwithstanding the fact that we propose to appeal from the Order. We are going to pay in accordance with it, under protest, reserving only what legal rights we have, which would include, we think, in the event the Order should be reversed or held inapplicable as to Natural, the right of restitution of the money, and I'm sure that's satisfactory to Panoma, and in those circumstances there is nothing at this time for either of us to present to the commission.

Mr. Robinson:

That's exactly the way I thought it was.

Mr. Green:

I think the Commission should, at some time, issue some kind of an order effecting everybody up there, and we will have to work out the details the best way we can. Skelly Oil Company called me and said they had an agreement with Cities Service, to whom they sell gas, that Cities Service is going to pay them this price of 9.8262, with the understanding that they would be released from it in the event the Supreme Court holds our Order void, but at the same time Skelly doesn't want to pay their royalty owners on the same basis. So I think that anybody who does not comply with the Order should put up a bond. The

Commission could provide such an order at this time to apply to anybody, regardless of whether or not they're going to appeal, otherwise it's liable to leave these folks up there holding the bag. In any event I can't think of all of them, and I don't think anybody else can.

Mr. Robinson:

Well, I talked to Skelly by long distance yesterday, and I told them that my principal clients in this matter were the mineral owners up there in Texas County. and if they didn't put up a bond I could, so they understand it.

Mr. Green:

There might be several other companies in the same position, I don't know. We should write an order. I think, requiring everybody to either comply with the order or put up a bond.

Mr. Robinson:

Well. I don't think you need to write that order. That's in the statutes, the Constitution provides that.

Chairman Bond:

Well, gentlemen, you agree upon an order and the Commission will execute it.

If there is nothing further the Commission will recess until 10:00 o'clock tomorrow morning.

Certificate.

State of Oklahoma,
County of Oklahoma. ss.

I, Roy K. Kerbow, duly appointed, qualified and acting official Court Reporter within and for the Corporation Commission of the State of Oklahoma, hereby certify that the above and foregoing was transcribed by me from a Soundscriber machine only and not from shorthand notes. Further, that the Reporter who was present at the above proceedings is now deceased, and his shorthand notes are not available to this Reporter.

I further certify that the above and foregoing transcript, with the exception of a few words, is a full, true, complete and correct transcript, transcribed to the best of my ability.

In Witness Whereof, I have hereunto placed my hand on this, the 22nd day of December, 1955.

ROY K. KERBOW.

EXHIBIT "B".

Before the Corporation Commission of the State of Oklahoma.

In the Matter of the Application of Certain Mineral Owners in Texas County, Oklahoma, for an Order Determining the Minimum Price at which Gas Producing from the Guymon-Hugoton Field may be first Purchased or Sold.

Cause CD No. 3628.
Cause No. 26111.

Report of the Commission.

Now, on this the 31st day of July, 1952, this cause comes on for further hearing before the Corporation

Commission of Oklahoma, for supersedeas filed herein by certain appealing parties, and the Commission being well and sufficiently advised in the premises, is of the opinion that the enforcement of Order No. 26096, issued herein on the 29th day of July, 1952, should be stayed until September 10th, 1952, at 10 o'clock a.m., during which time the appealing parties and all other parties interested who desire to further stay the enforcement of said order may file herein their supersedeas bonds, said bonds to be approved by the Commission.

Order.

It Is Therefore Ordered by the Corporation Commission of Oklahoma. that this matter be further set for hearing before the Corporation Commission of Oklahoma, on the 18th day of September, 1952 at 10 o'clock, a.m., in its Court Room, Capitol Office Building, Oklahoma City, Oklahoma, for the purpose of determining any dispute if any, relating to the terms, conditions and amounts of said bonds.

It Is Further Ordered that the enforcement of said Order No. 26096, issued herein on the 29th day of July, 1952, is hereby stayed until September 10th, 1952, at 10 o'clock, a.m., and thereafter as to all parties having filed bonds approved by this Commission until final determination of any and all appeals.

Done and Performed this 31st day of July, 1952.

CORPORATION COMMISSION
OF OKLAHOMA,
RYAN A. BOND,
CHAIRMAN,
RAY O. WEEMS,
Vice-Chairman,
ROY C. JONES,
Commissioner.

Attest:
TOM McMURRAY,
Secretary.

I, Carl B. Mitchell, Secretary of the Corporation Commission of the State of Oklahoma, do hereby certify that this is a true and correct copy of the original on file in this department.

In Witness whereof, I hereunto set my hand and affix the seal of the Corporation Commission of the State of Oklahoma, Done in the Office of the Commission this the 21 day of December 1955, Oklahoma City, Oklahoma.

CORPORATION COMMISSION
OF OKLAHOMA,
By CARL B. MITCHELL,
Secretary.

• • • • • • • •

## Affidavit of T. Murray Robinson.

(Title Omitted.)

Filed: January 6, 1956.

State of Oklahoma,
County of Oklahoma. ss.

T. Murray Robinson, being first duly sworn, deposes and says:

I am an attorney residing in Oklahoma City, Oklahoma and have been engaged in the practice of law in the State and Federal Courts of Oklahoma for many years.

I represented the applicants in a proceeding before the Corporation Commission of Oklahoma styled, "In the Matter of the Application of Certain Mineral Owners in Texas County, Oklahoma, for an Order Determining the Minimum Price at which Gas Produced from the Guymon-Hugoton Field may be First Purchased or Sold," such cause being docketed before said Commission as CD No. 6328.

That the Panoma Corporation, which was also my client, was not an applicant or a party to, and made no appearance in that proceeding, either through me or otherwise. The above styled proceeding resulted in an Order of the Commission numbered 26096, dated July 29, 1952, effective August 1, 1952.

The order fixed as a minimum price for the gas produced from the Guymon-Hugoton Field the sum of 9.8262 cents per thousand cubic feet measured at a

pressure of 14.65 pounds per square inch if sold at the well head, and if sold elsewhere at an equivalent price to be determined by a formula therein provided.

That after said order was entered, Mr. Coleman Hayes, who represented Natural Gas Pipeline Company of America in said proceedings, visited with me by telephone concerning the effect of said order on the relationship of Panoma and Natural. In the course of that conversation I told Mr. Hayes that in my opinion as a lawyer the order of the Commission would become binding unless superseded and that Panoma, like all others, would be compelled to abide thereby, and that in my opinion the order directed producers who were not receiving the minimum price to cease deliveries.

I did not tell Mr. Hayes what Panoma would do, as I had no authority to so say. I am not sure that I would have recommended to Panoma that they actually cease delivering gas if Natural had refused to make payment of the sum of 9.8262 cents per thousand cubic feet, or its equivalent, but I am certain that I never told Panoma to cease making such deliveries as Natural did pay the prescribed price and the question did not arise.

In a second conversation with Mr. Hayes, he inquired if Panoma would agree to place in escrow the difference between the prior price and the increased price. I did check with the officials of Panoma concerning this escrow agreement, and advised Mr. Hayes that they would not agree to the escrow.

In a third conversation with Mr. Hayes, I think I told him that I had agreed with Northern Natural Gas Company, which was also a protestant to the Commission's order, that it might make its own supersedeas bond. A copy of the bond agreed to is hereto attached as Exhibit "A". I was not approached by Mr. Hayes or anyone representing Natural as to the conditions which would be imposed or might be agreed to in a bond, if filed by Natural, but if so requested I, as attorney for the applicants, would have agreed to the same arrangement made with Northern Natural.

After such conversations, the Corporation Commission of Oklahoma held a hearing on September 10, 1952 for the purpose of fixing the amounts, terms and conditions of supersedeas bonds for any protestant who desired to make such a bond pending an appeal from the Commission's order.

Since receiving a copy of Mr. Hayes' 'affidavit which has been filed herein, I requested the reporters for the Corporation Commission to prepare for me a transcript of the proceedings before the Commission at the September 10, 1952 hearing. The reporter who recorded such proceedings is now deceased, but the associate reporters with the Commission have transcribed his notes, and in such transctiption the following statements appear:

"Mr. Robinson: As I understand it, Your Honor, this is set down for a determination of the conditions and the amount of supersedeas bonds which may be executed by the various purchasers who wish to stay the effectiveness of this order. I have worked out

an agreement with Northern Natural, I think it is, and I signed a stipulation, but as to whether or not that has been filed with the company or not, I don't know. I agreed with them as to the form and to the amounts of which certain bonds they were to file. No other company has approached me as representing the royalty owners to try to work out an agreement for the amount of the bonds. I think the rest of them are just going to comply and obey the order in the meantime. So I don't know as there is anything further to be done on today's docket, unless Mr. Hayes has some matter he wishes to take up with the Commission. I happen to know about Mr. Hayes, because I have seen an exchange of letters between the purchasers involved, and by the exchange of those letters I understand that they're going to appeal. I'm sure they are if they don't put up a bond today.

"Mr. Hayes: I would like permission, if the Commission please, to make a short explanation here, that the only purpose of my being here is because I understand, as did Mr. Robinson, that this matter was set for today so that if any controversies have arisen in connection with the terms and provisions of the bonds, that the Commission might decide it. I can tell you what Natural Gas Pipeline Company of America is going to do, and from what Mr. Robinson tells you he's aware of it, and that is, under the compulsion of the order itself and by reason of the stress on Northern from whom Natural purchases its residue gas, that unless payment is made at the price fixed in the order they will shut off our gas, notwithstanding the fact that we propose to appeal from the order. We are going to pay in accordance with it, under protest, resulting only in what legal rights

we have, which would include, we think, in the event the order should be reversed or held inapplicable, Northern Natural to the right of restitution of the money, and I'm sure that is satisfactory to Northern Natural. And in those circumstances there is nothing at this time for either of us to present to the Commission."

I believe that the references in Mr. Hayes' statement to Northern Natural were, in fact, to Natural Gas Pipeline Company.

Prior to the hearing on September 10, 1962 I had not seen a copy of Natural Gas Pipeline Company's letter of September 9, 1962. I have since read such letter. The correspondence I refer to was an exchange of letters with respect to the proposed escrow arrangement.

That the foregoing related facts are within the personal knowledge of this affiant, and although the exact language cannot now be recalled, that the substance as herein related is true.

(S.) T. MURRAY ROBINSON,
(T. Murray Robinson).

Subscribed and sworn to before me this 27th day of December, 1955.

(S.) EVE DAVIS,
(Seal) Notary Public.

My Commission expires: 2-4-56.

EXHIBIT "A".

Before the Corporation Commission of the State of Oklahoma.

In the Matter of the Application of Certain Mineral Owners in Texas County, Oklahoma, for an Order Determining the Minimum Price at which Gas Produced from the Guymon-Hugoton Field may be first Purchased or Sold.

Cause CD No. 3628.

Supersedeas Bond.

Know All Men By These Presents: That

Whereas, in the above entitled cause and proceeding Order No. 28036 was promulgated and entered by the Corporation Commission of Oklahoma on the 29th day of July, 1982, effective August 1, 1982, whereby it was in substance provided that no gas shall be produced in the Guymon-Hugoton Field of Oklahoma or sold by our producer after processing except at a price of not less than 9.8262c per thousand cubic feet, measured at a pressure of 14.65 pounds per square inch absolute, and detailing the circumstances applicable to such production or a sale of produced gas; and

Whereas, Northern Natural Gas Company, an interested party to said proceeding, is aggrieved by said order and intends to prosecute proceedings to the Supreme Court of Oklahoma to reverse, vacate or modify said order and desires that the operation of said order be suspended and superseded pending the final determination of said appeal;

Now, Therefore, Northern Natural Gas Company, as Principal and Surety, is hereby held and firmly bound unto the State of Oklahoma for its benefit and for the benefit of all persons or companies that may be aggrieved by the appeal of Northern Natural Gas Company to the Supreme Court of the State of Oklahoma of Order No. 26096 in Cause No. 3628 of the Corporation Commission of the State of Oklahoma, that the said Northern Natural Gas Company shall well and truly do and perform all things that may duly and legally be enjoined upon it by said order in case said order shall be finally affirmed in whole or in part.

Executed as of the ... day of ....., 1952.

NORTHERN NATURAL GAS COMPANY,

By .....,
President,
Principal and Surety.

Attest:

.....,
Secretary.

Filed: January 6, 1956.

Dated December 31, 1955.

Affidavit of D. D. Harrington.

The State of Texas,
County of Potter.

Before Me, the undersigned Notary Public in and for the County of Potter, State of Texas, on this day personally appeared D. D. Harrington, known to me

personally to be the person whose name is subscribed hereto, who having been by me first duly sworn, upon his oath deposes and says:

1. Affiant was President of Panoma Corporation at the time Price Order No. 26096 was promulgated by the Corporation Commission of the State of Oklahoma, said order providing natural gas produced in the State of Oklahoma should not be sold at a price of less than 9.8282 cents per thousand cubic feet; and affiant thereafter at all times continued to be President of Panoma Corporation until the time of its dissolution on July 1, 1954.

2. Affiant knows of his own personal knowledge, and here now states, that at no time did Panoma Corporation or any of its authorized officers, agents, attorneys, or employees inform or advise Natural Gas Pipeline Company of America that in the event said Natural Gas Pipeline Company of America did not pay the amount in said price order provided or supersede same that Panoma Corporation would cease deliveries under any contract existing between Panoma Corporation and Natural Gas Pipeline Company of America. Affiant further states that no officer, agent or representative of Natural Gas Pipeline Company of America made any inquiry of Panoma as to whether Panoma would continue to deliver the gas in the event Natural Gas Pipeline Company of America did not comply with or supersede Order No. 26096; that the letter of protest of September 9, 1952 was not received by Panoma until on or about September 12, 1952. Affiant further states that although Order No. 26096 became effective on August 1 that Panoma Corporation had no notice or knowledge as to whether or not Natural Gas Pipeline Company of America

would comply with that order or supersede it until the receipt of the protest letter on September 12, 1952, and that deliveries had continued to be made to Natural Gas Pipeline Company of America in the normal course of business after the order was entered and continued during the entire period of time that the order was in effect both prior to and after the receipt of the protest order. That during the summer and fall of 1952 Panoma was negotiating with Natural Gas Pipeline Company of America in an attempt to sell Natural Gas Pipeline Company of America the producing properties which were the subject of the contract and that at no time was there any discussion or threat to discontinue deliveries under the contract.

3. Affiant further says that all gas which Panoma Corporation had previously contracted to deliver to Natural Gas Pipeline Company of America at the time said price order was entered was residue gas to be delivered after extraction of gasoline at Panoma Corporation's Hooker Plant in Hooker, Oklahoma. At all times beween the time of entry of said price order and July 1, 1954, Panoma Corporation had no means of disposing of residue gas from said plant other than by delivery of such gas to Natural Gas Pipeline Company of America at its pipeline in the vicinity of said Hooker Plant. During said period Panoma Corporation had no other outlet or market for its said residue gas, and had such residue gas not been delivered to Natural Gas Pipeline Company of America, the Panoma Corporation would have had no outlet or market for its residue gas and would have been compelled to shut down said gasoline extraction plant. In the event said gasoline extraction plant had been shut down, large amounts of time,

labor, and expense would have been required to again place the plant in efficient operation; moreover, said plant was extracting gasoline from raw gas produced from oil and gas mining leases owned by Panoma Corporation during all of said period between the time of entry of said price order and July 1, 1954. In the event said plant had been shut down, Panoma Corporation would have been compelled either to find a new market for raw gas produced from said leases or to concede such leases to have terminated for failure to produce gas therefrom in the paying quantities required to keep such leases in force and effect. Affiant further says that under the contract between Natural Gas Pipeline Company of America and Panoma Corporation, the Natural Gas Pipeline Company of America was required to compress all gas processed through said plant and had installed the machinery to do so; and Panoma Corporation had no means of so compressing such gas. Without such compression no gas could be processed through said plant, and, therefore, as a practical matter Panoma Corporation would have been compelled to shut down said plant in the event it had ceased deliveries to Natural Gas Pipeline Company of America of residue gas from said plant, and could not have again commenced plant operation without the expenditure of many hundreds of thousands of dollars required to install the compression machinery which Natural Gas Pipeline Company had provided; and installation of such machinery would have required many months of time. In the meantime, said leases would have terminated unless Panoma Corporation had, pending the time of installation of such machinery, found a market for the raw gas produced from such leases.

4. Affiant further says that under contract dated August 19, 1952, Panoma Corporation agreed to sell and deliver to Natural Gas Pipeline Company of America supplemental gas in addition to the gas to be delivered under the contract described in Plaintiff's Original Complaint said supplemental gas to be commingled at the plant intake with gas to be delivered under the contract described in Plaintiff's Original Complaint, and after gasoline extraction the commingled mass to be delivered to Plaintiff as residue gas. Pursuant to the terms and provisions of such contract, said supplemental gas was commingled with the gas covered by the contract described in Plaintiff's Original Complaint during the periods from August 19, 1952, to August 1, 1953, and from January 23, 1954, to July 1, 1954, and the entire residue gas remaining after extraction of gasoline delivered to Plaintiff. Due to the fact gas covered by the original contract described in Plaintiff's Original Complaint was commingled in the supplemental raw gas stream at the time Panoma Corporation acquired such supplemental gas, and due to the further fact super compressibility tests were not performed upon the supplemental gas, it was necessary to estimate the volume of supplemental gas delivered to Plaintiff. Natural Gas Pipeline Company of America each month determined the volume of gas it received, including supplemental gas, and reported such facts to Panoma Corporation. Panoma Corporation upon receipt of such information then billed Natural Gas Pipeline Company of America for such gas, stating separately the amount due for supplemental gas. Upon receipt of such statements, Plaintiff each month then sent a check bearing the following provision upon the face thereof:

"Acceptance of this check constitutes full payment of and settlement for the amount described on the statement attached."

Such checks in each instance were either made payable and sent to Panoma Corporation or sent to the First National Bank of Oklahoma City and made to the following payee:

First National Bank of Oklahoma City
Trustee for Panoma Corporation
Att: Mr. A. N. Murphy, Vice-Pres.
Oklahoma City, Oklahoma

Upon the checks for the months for which payment was made for both supplemental gas and gas covered by the contract described in Plaintiff's Original Complaint, a voucher attached to and made a part of each respective check contained the following legend, completed for the appropriate period of time:

"Payment of gas purchased on original and supplemental contracts from ..... to ..... ....."

Plaintiff's checks made for payment of gas delivered during months in which no supplemental gas was delivered contained the following legend on the checks in each instance, completed for the appropriate period of time:

"Payment of gas purchased on original contract from ..... to ....."

The payee designated in said checks in each instance accepted said checks and indorsed and cashed the same.

D. D. HARRINGTON,
Affiant.

Sworn to and Subscribed Before Me by the above affiant on this 31st day of December A. D. 1955.

ALLYNE E. WHELCHEL,
(Allyne E. Whelchel),
Notary. Public in and for
Potter County, Texas.

(Seal)

My Commission expires June 1, 1957.

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Vinson, Elkins, Weems & Searls
Attorneys at Law
Esperson Building
Houston 2, Texas

Filed: June 27, 1956.

January 12, 1956

Re: C. A. No. 2070 Amarillo Division, Natural Gas Pipeline Company v. D. D. Harrington, et al.

Honorable Joe E. Estes
Federal Building
Dallas, Texas

Dear Judge:

To complete the record, we are enclosing herewith for consideration on the Motion for Summary Judgment and Motion to Strike copies of orders of the Federal Power Commission issued on January 5, 1956. The first order overrules the Motion for Rehearing filed by Natural Gas Pipeline Company of America with respect to the order issued on November 14, 1955. The second order dismisses pending rate

proceedings and fixes the rate of 9.8262c for Dorchester, which is the successor in interest of Panoma.

It is believed that these matters of which the Court can take judicial notice and we request that they be included as a part of the record in the proceeding.

With best personal regards,

Yours very truly,

VINSON, ELKINS, WEEMS & SEARLS,

By DAVID T. SEARLS.

42:67A

Encls.

cc: Mr. Warrent T. Spies,
Mr. D. H. Culton.

United States of America.

Federal Power Commission.

Before Commissioners: Jerome K. Kuykendall, Chairman, Claude L. Draper, Seaborn L. Digby and Frederick Stueck.

In the Matter of:

Dorchester Corporation.

Docket No. G-6505.

Order Denying Petition for Rehearing and Request for Oral Argument.

Adopted: December 29, 1955.

Issued: January 5, 1956.

On December 7, 1955, Natural Gas Pipeline Company of America, (Natural), filed an application for

rehearing of the order of the Commission issued November 14, 1955, reversing the initial decision of the Presiding Examiner. Said order of the Commission dismissed Natural's petition to require Dorchester Corporation (Dorchester) to increase the amount of the surety bond furnished by Dorchester in connection with its proposed rate increase filing in this proceeding. Natural states that Phillips Petroleum Company v. Federal Power Commission, decided by the Court of Appeals for the 10th Circuit on November 16, 1955, requires a result different from that reached in said order issued November 14, 1955. We do not so construe this decision of the 10th Circuit.

In the alternative. Natural requests oral argument on said application for rehearing.

The Commission finds:

No new facts have been presented in Natural's application for rehearing, and no new principles of law are stated therein which either were not fully considered by the Commission before it entered its order issued November 14, 1955, or which now having been considered warrants rehearing, or modification of said order.

The Commission orders:

The petition for rehearing and the request for oral argument filed by Natural Gas Pipeline Company of America on December 7, 1955, in this proceeding, be and the same is hereby denied.

By the Commission. Commissioner Draper dissenting.

J. H. GUTRIDE,
Acting Secretary.

Order Dismissing Proceedings.

United States of America.

Federal Power Commission.

Before Commissioners: Jerome K. Kuykendall, Chairman; Claude L. Draper, Seaborn L. Digby, and Frederick Stueck.

In the Matter of:
Dorchester Corporation.
Docket No. G-6505.

Adopted: December 30, 1955.

Issued: January 5, 1956.

On December 6, 1954, Dorchester Corporation (Dorchester), an independent producer, tendered for filing Supplement No. 4 to its FPC Gas Rate Schedule No. 2, providing for an increase in its rate to ten cents per Mcf for natural gas sold to Natural Gas Pipeline Company of America (Natural), produced in the Guymon-Hugoton Field, Texas County, Oklahoma.

By order issued December 29, 1954, the Commission suspended the proposed change in rates until March 1, 1955, and ordered a hearing therein on a date to be fixed by further order of the Commission. Thereafter Dorchester filed a motion, pursuant to

Section 4 of the Natural Gas Act (Act) to place said new rate into effect under a bond; and by order issued April 7, 1955, the Commission permitted the proposed 10-cent rate to become effective as of March 1, 1955, subject to the filing by Dorchester of a corporate surety bond to assure refund of any portion of such increased rate which the Commission might ultimately find not to be justified.

Pursuant to Commission order issued September 28, 1955, hearings were held with respect to the lawfulness of the proposed increased rate contained in said Supplement No. 4. After the hearings, on December 23, 1955, we issued an order omitting the intermediate decision procedure, and pursuant thereto the Presiding Examiner certified to us the record in this proceeding.

Thereafter, on December 27, 1955, Dorchester filed as its rate to be effective as of March 1, 1955, the date of expiration of the suspension of Dorchester's proposed change in rates embodied in its aforesaid Supplement No. 4, the rate of 9.8262c, which the Commission has heretofore found to be the effective rate on June 7, 1954, within the meaning of Order No. 174-A. Dorchester stated that upon acceptance of this rate by the Commission, Dorchester will promptly issue an appropriate credit memorandum to Natural for the difference between the payments made by Natural at the 10c rate and 9.8262c rate, plus interest at 6% per annum on such amount from the date of payment to the date of the issuance of such memorandum. The stated purpose of this filing was "to remove any uncertainty with respect to the status of the rate proceeding" in this docket, and to "settle and terminate all matters" herein.

Under the authority contained in Section 4, 16 and complementary provisions of the Act, the termination of this proceeding is proper since it permits the orderly and expeditious disposition of a matter the continuation of which would serve no further purpose, in a manner consonant with the proper and efficient exercise of our functions under the Act and with the interests of the parties and the public.

In view of the foregoing, Dorchester's letter filed with the Commission on November 15, 1955, should be rejected. Also Dorchester should be required to refund to Natural the increase based upon the difference between 10 cents and 9.8262 cents per Mcf plus interest at the rate of 6% per annum on such difference from dates of payments by Natural to the date of refund.

The Commission orders:

(A) The increase in rates and charges proposed by Dorchester Corporation by Supplement No. 4 to its FPC Gas Rate Schedule No. 2 filed on December 6, 1954, be and the same is hereby dismissed, and said filing shall have no force or effect.

(B) Effective as of the date of issuance hereof the permission heretofore granted in the Commission's order issued April 7, 1955, that Dorchester Corporation provisionally collect and receive, subject to bond, the increased rate provided for by Supplement No. 4 to its FPC Gas Rate Schedule No. 2, shall cease and terminate.

(C) Effective as of the date of issuance hereof, the rates and charges provided in Supplement No. 3 to Dorchester Corporation FPC Gas Rate Schedule No. 2, as effective prior to the filing of Supplement No. 4, is hereby reinstated.

(D) Within 30 days from the date of issuance of this order Dorchester Corporation shall make refund to Natural Gas Pipeline Company of America of the increase based upon the difference between 10c and 9.8262c per Mcf plus interest at the rate of 6% per annum on such difference from the dates of payment by Natural to the date of refund, and shall report to the Commission in writing and under oath, in quadruplicate, within 15 days after the making of such refund, the amount of refund, the dates covered by the refund, the billing units and all other pertinent data. If agreeable to Natural, such refund may be accomplished by the issuance by Dorchester of appropriate credit memorandum to Natural, subject to the requirements of this paragraph.

(E) Dorchester's letter dated November 15, 1955 is hereby rejected.

(F) Nothing contained in this order shall be construed as a waiver of the requirements of Section 7 of the Natural Gas Act; nor shall it be construed as constituting approval by this Commission of any service agreement, rate, charge, classification, or any rule, regulation or practice affecting such service agreement or rate; nor shall this order be deemed as recognition of any claimed contractual right or obligation affecting or relating to such service agreement or rate.

By the Commission. Commissioner Draper dissenting.

J. H. GUTRIDE,
(J. H. Gutride),
Acting Secretary.

19. The following excerpts from the oral argument (pp. 229-326) had before the Honorable Joe E. Estes on January 6, 1956, on the motion or summary judgment of Natural Gas Pipeline Company of America:

"The Court:
Is the defendant ready to proceed?

Mr. Searls:
If the Court please, we recognize that the legal issues which are involved in this case are somewhat complicated.
We also concede the fact to be that some of the law questions raised here are matters of first impression.

But, the question before Your Honor on these motions is actually a very simple one, and I submit to Your Honor that there is really only one issue that should be determined at this time on the motions to strike and on the motion for summary judgment, and that is shown by stating the nature of this proceeding.

The plaintiffs state in their complaint that it is a suit for restitution by reason of unjust enrichment.

That is called by the Courts a proceeding ex gratia, it is out of the gratitude of the Chancellor, because it is an equitable proceeding.

It is a matter addressed to the sound discretion of Your Honor sitting here as you are, as the Chancellor, in this equitable proceeding.

That fact alone, that it is an equitable proceeding, addressed to the discretion of this Court sitting here as the Chancellor, established that it cannot be determined except in the light of all the facts, and all the circumstances, which necessarily require a trial of the case.

In other words, I say this is a very simple issue before Your Honor this morning, because the only question is, are there any fact issues here? Is this a cold question of law that is being submitted to Your Honor, or is it an equitable proceeding addressed to the discretion, the sound discretion of the chancellor. It can't be questioned what the character of the proceeding is. They concede the fact to be that it is an equitable proceeding, that it is a suit in restitution because of unjust enrichment.

And the Courts have repeatedly held that if that character of a proceeding can be maintained, it must be considered and viewed by the chancellor in the light of all the equities, and in the light of all the facts and circumstances.

And I say, that being true, then, this morning the only question is whether this is an issue of fact and should be heard and determined by the chancellor in the light of all the facts and circumstances, and after a complete development of evidence.

We challenge the question of whether they can maintain this as a suit for restitution, that is a question of law, but if they can maintain it, then clearly there must be a trial of the case.

And I submit, Your Honor, that this case at this time is narrowed down, really, to that one question, that this is an equitable proceeding, that must be considered in the light of all the facts and circumstances, and only after a complete development of the case. . . ." (pp. 256-258)

". . . I will tell Your Honor why they wanted to make those payments. They wanted to go before the Federal Power Commission for a rate increase, and when they did go, just twenty days after September 10, 1962 they filed their application for rate increase, with the Federal Power Commission on October 1, 1962. If they paid us a higher price for natural gas they could get a higher price from the Federal Power Commission, from their customers, and it would be passed on, and ultimately the order was entered giving them a higher price for natural gas, based on the higher price they were paying to Pan-oma.

Why, they say that order provides though, if this order is held invalid we will have to refund to our customers, so, we are not going to get any benefit in this recovery.

Why, who are their customers? The parent company, the People's Light & Coal Company of Chicago, that is the one that is to get the refund, that company is not under the jurisdiction of the Federal Power

Commission. This is under the jurisdiction of the Illinois Power Commission.

As to whether or not it would have to make refund to the consumers in Chicago, we don't know, that would depend upon the Illinois Power Commission. Yet, they refer to this order of the FPC which says if we recover we will have to make recovery to our customer, and the parent company, as I understand owns this company's stock one hundred per cent, and the order provides they will plan a refund to their customer.

I say they were under no compulsion, but the question of whether or not they were under compulsion, or whether or not they were under duress is certainly a question of fact.

Certainly a question of duress or coercion is always an issue of fact, depending upon the evidence in this case, and could only be determined after a trial of the case. . ." (pp. 271-272)

". . . I submit, Your Honor, there is the narrow question before Your Honor, this is a matter where the facts should be developed, the facts should be developed, and they can't be developed on motion for summary judgment. It is an equitable proceeding, it has to be determined by the exercise of the discretion of Your Honor, as a Chancellor, inquiring into it. . ." (pp. 280)

". . . Mr. Ross:
I would just like to respond to the question of why Natural filed or did not supersede the second rate,

and there is no secret about that. The reason we superseded the 7 cent rate is because we couldn't possibly get it in our own rates and we had to supersede it.

Now, when it came up to the second rate, because it was a forward looking rate we were in a position to come into the Federal Power Commission and file for this increased rate, and until the Phillips case came along our prospect of winning this case or defeating this 9.8 cents order didn't look too good, so we couldn't take the risk of superseding the 9.8 cent price and losing that case, and then have to respond out of our own pocket, without any recovery from our royalty owners.

So, naturally, as soon as the rate of the 9.8 cents came along, within two or three weeks we filed the case with the Federal Power Commission, and if we lose that case we could probably recover from our customers.

Mr. Searls made the point that the People's Gas was the parent company and this refund would be made to the parent company, and he said he didn't know whether the parent had to refund it, or not. He should have asked that question. It is very easily ascertained, because under our rates that we filed with the Illinois—

Mr. Culton:
Which the People's filed.

Mr. Ross:
Which the People's filed, of which I am counsel, we have a clause any refunds we get with respect to

payments from our suppliers must be refunded to our customers, so it follows all the way along. So, there is no enrichment any place, except we lose six months on this, so far as our customers are concerned, because under the Federal Power Act it requires six months for the rate to become effective. If we file on a certain day, then it takes 30 days for the rate to become effective; if they don't dispute it, then they suspend it for five months, so actually it takes six months. We have six months gap then before we start making it. . ." (pp. 302-303)

". . . Mr. Searls:

Let's explore that point, we have just heard a statement by Mr. Ross who is general attorney for the company, and as I understand the statement he made on the record, the reason they did not supersede, and the reason why they went on and paid, they paid it to protect themselves, they wanted to file an application for increase in rates. Sure, they paid it to protect themselves against restitution on behalf of the customers if the rate stood up. In other words, they did not fail to supersede because they were afraid the gas would be cut off. It was business reasons that caused them to take this action. They thought it was good business to go ahead and pay. Now, I understand that is what Mr. Ross had to say, he made a real admission in the record, that I charged in my argument, that the reason they did not supersede and went ahead and paid was not because they were afraid the gas was going to be cut off, they got these affidavits whether or not the gas was going to be cut off or wasn't going to be cut off, that isn't what they were worrying about, they wanted to pay, whether it was escrowed or wasn't escrowed, they wanted to pay it directly, so they

could go before the Federal Power Commission and ask for increase in rate.

Mr. Ross made that statement when he first got up, that that is the reason they didn't supersede, that is why they went ahead, they weren't afraid to be cut off. He made the statement in the record which appears in this case as being the real reason, which I charged as a fact in my argument, for business reasons, they considered it to be the advisable thing to do, and I want to say to Your Honor that if I had been in their shoes I would have done the same thing they did, I would have made the payment.

The matter had been upheld in the Supreme Court of the United States.

The Court:
You paid the royalty owners?

Mr. Searls:
Yes, we paid the royalty owners, and, of course, after they paid us we had to pay the royalty owners, we were getting the money from them, and the royalty owners were entitled to their one-eighth of the proceeds we received for the natural gas, after they paid us we had to pay the royalty owners, but we never paid the royalty owners under the seven cent order, Your Honor, which they never paid us, until it was upheld by the Supreme Court of the United States.

The Court:
Are you in position to get restitution either against the royalty owners, or against the taxing authorities?

Mr. Searls:

We have not considered we are. We have never made any attempt to do so under the settlement order. It is not practical, with all the royalty owners to get restitution. Therefore, I would say Mr. Ross has made the statement on the record that was the reason they paid, and when they didn't supersede, it was not because they were afraid the gas would be cut off, business reasons, business considerations does not constitute the coercion and duress contemplated by the law. In other words, just because they considered it good business reasons to go ahead and do it. . . " (pp. 310-312)

20. Letter of Vinson, Elkins, Weems & Searls to the Honorable Joe E. Estes, dated January 12, 1956, together with two orders of the Federal Power Commission transmitted therewith, both issued on January 5, 1956, the first order overruling the motion for rehearing filed by Natural Gas Pipeline Company of America with respect to order issued on November 4, 1955, and the second order dismissing rate proceedings and fixing rate of 9.8262c for Dorchester Corporation, the successor in interest of Panoma Corporation (pp. 223-228).

This stipulation is executed with the reservation by each party of the right to print, as a supplemental transcript or as an appendix to brief, any portion of the filed transcript which is not to be printed under this stipulation.

Dated this June 28, 1956.

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Attorneys for Appellant-Appellee—Natural Gas Pipeline Company of America.

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Attorneys for Appellants-Appellees—D. D. Harrington et al.

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## OPINION OF HONORABLE J. E. ESTES, UNITED STATES DISTRICT JUDGE.

Dated March 9, 1956.

(Title Omitted.)

Plaintiff seeks restitution for the difference in its contract rate for the purchase of gas and the price paid under an invalid minimum rate order of the Oklahoma Corporation Commission. Plaintiff has moved for summary judgment.

The uncontroverted facts in this case are as follows:

Defendants and others under the firm name of Harrington and March, called "Sellers", being the owners

of mineral leases covering 78,000 acres of land in the Guyman-Hugoton gas field, in the County of Texas and State of Oklahoma, entered into a "Gas Purchase Contract" effective December 1, 1946, with plaintiff, herein called "Natural", an interstate pipeline transporter of natural gas, whereby it was agreed that (1) Natural would expand its facilities, including construction of certain pipelines and a compressor station at a point designated in the contract; (2) Sellers would drill wells, install gathering lines, construct a gasoline and dehydration plant, etc., and maintain and operate their property so as to make available for delivery the agreed quantities of gas; (3) Sellers would sell and deliver to Natural, and Natural would purchase and receive from Sellers stipulated quantities of gas per day; (4) said gas would be delivered to Natural at the intake side of its compressor station and by it compressed and redelivered to Sellers at Sellers' gasoline plant, where Sellers would remove certain constituents, including liquid hydrocarbons; (5) Sellers would redeliver the residue gas to Natural at its meter station near the outlet side of Sellers' plant, at which point title should pass to Natural; (6) Natural would pay for each thousand cubic feet of gas delivered, a base price (with certain adjustments for BTU's) of (a) until July 1, 1951, six cents, and (b) for five years thereafter, seven cents, the quantity delivered to be measured at a base temperature of 60° F. and an absolute pressure of 16.4 pounds per square inch (which prices are equal to 5.35974 cents and 6.253 cents per M.c.f. respectively for gas measured at 14.65 pounds pressure) with a slightly different price provision applying to gas used for fuel by Natural in its compressor station.

As to payment, the contract provided that Natural would render monthly statements to Seller showing the quantities of gas delivered, with supporting data, whereupon Sellers would render an invoice for such gas, and Natural would make payment; that if Natural should fail to pay any amount due, to the extent not in bona fide dispute, for a period of sixty days after its due date, Sellers could suspend deliveries of gas until such payment was made; that any statement or invoice was to be subject to correction within one year after payment made by Natural for gas delivered during any calendar month, but if claim for correction was not made within that time, such statement and invoice would become final as to both parties; that Natural might at its option make payments of any amounts due by deposit to Sellers' "credit in the First National Bank and Trust Company of Oklahoma City".

It was further provided that:

"This contract is subject to present and future valid laws and present and future lawful orders of all regulatory bodies now or hereafter having jurisdiction over the parties; and should at any time during the term of this contract either party, by force of any such law or regulation imposed, be ordered or required to do any act inconsistent with the provisions of this contract, the contract shall, subject to the other provisions hereof, continue nevertheless, but shall be deemed modified to conform with the requirements of such law or regulation."

It recited, among other things, that Natural contemplated the expenditure of large sums of money in

the construction of pipe lines to Sellers' properties and:

"because of such expenditures and because the nature of its business requires assurance that the gas reserves of Seller shall be continuously available to Natural during the entire period of this contract, the parties agree: that the provisions hereof shall be deemed covenants running with . . . the property. . ."

Deliveries of gas under the contract commenced in small quantities in August 1948. On about October 1, 1948, Panoma Corporation was created by the members of the Harrington and Marsh partnership, and the gas properties, together with all rights under the contract, were transferred to it. Deliveries by it of gas in substantial quantities commenced in November 1948, and continued thereafter.

This contract was an important one to both parties, and on August 1, 1952 and thereafter, the gas deliverable under it constituted a substantial portion of Natural's source of supply.

Under date of July 29, 1952, Oklahoma Corporation Commission (herein referred to as the State Commission), upon:

"application of certain mineral owners in Texas County, Oklahoma, for an order determining the minimum price at which gas in the Guyman-Hugoton Field may be first purchased or sold",

entered its order No. 28098, providing that:

"No gas shall be produced from any well located in the Guyman-Hugoton Field of Oklahoma except at a price of not less than 9.8262c per thousand cubic feet at the wellhead . . . If the gas is processed for extraction of liquid hydrocarbons and sold during or at the conclusion of gathering, the price for the residue gas shall be not less than 9.8262c per thousand cubic feet" (with certain adjustments for BTU content).

Under this order gas was to be measured at 14.05 pounds per square inch absolute. Its effective date, August 1, 1952, was temporarily stayed by Commission order of July 31, 1952, until September 10, 1952,

"during which time the appealing parties and all other parties interested who desire to further stay the enforcement of said order may file herein their supersedeas bonds, said bonds to be approved by the Commission."

A further hearing was had on September 10, 1952 to consider the "terms, conditions and amounts" of supersedeas bonds. No supersedeas bond was filed or proffered by Natural or Panoma. Such a supersedeas was filed by another pipeline company (Northern Natural), which is material here only as indicating one form of "bond" which was acceptable to the Commission. It constituted merely an undertaking, without surety, to perform "all things that may duly and legally be enjoined upon it by said order in case said order shall be finally affirmed in whole or in part." It appears from the affidavit of the attorney who represented the mineral owner applicants for the order that this was a form of "bond" agreed to by him,

and that if requested, he, as attorney for these mineral owners, would have agreed to the same form of bond for Natural.

Under date of August 26, 1952, Natural wrote Panoma, referring to Order No. 26096, and stating among other things:

"You have informed us that you interpret such order as applying to the gas sold by Panoma to this Company . . . and have also informed us that, unless payments be made by us at the minimum price set forth in such order (instead of the price set forth in such contract), you will discontinue the delivery of gas . . . to us in accordance with the provisions of such contract. . ."

The letter continued that Natural denied that the order could lawfully be applied to their gas; that it had filed notice of appeal, which it would prosecute; that pending final adjudication it was necessary that the gas be delivered to Natural in order that it might fulfill its obligations to its customers and provide supplies of gas to consuming areas served by it in accordance with its certificates of public convenience and necessity; that it could not replace said gas from any other source, on any reasonable basis; that its rights and the rights of its consuming public could not be adequately protected through the filing of a supersedeas bond; that it was necessary that its rights be protected and preserved pending the appeal; and stated:

"Natural will therefore, each month, upon receipt of proper accounting statements, pay in accordance with the contract price and, in addition thereto, will

make payments for the difference between such contract price and the price fixed by the Commission for such gas in said order.

"Payments of all sums in excess of the contract price, however, will be made involuntarily and under protest because of the compulsion and coercion resulting from the threat of the order itself and your interpretation of such order as prohibiting you from producing and delivering such gas to Natural under said contract at a price less than the minimum price fixed by the Commission in such order.

"You will understand, of course, that each payment of such difference is and will be made involuntarily and under protest without an express repetition of the protest and the grounds thereof at the time of each payment. In the event such order shall be held invalid or inapplicable to the gas sold and delivered by you to us under such contract, Natural will assert the right under familiar doctrines of business compulsion, unjust enrichment and restitution to a return to Natural of the additional payments so made under protest, with lawful interest thereon."

It further suggested that by agreement the "additional amounts" be held in escrow by the bank pending final determination as to the order, all claims for interest to be waived.

Under date of August 30, 1952, the President of Panoma wrote the President of Natural, on the letterhead of Panoma, stating that Natural's letter had been submitted to "our attorneys" in Oklahoma City for recommendation and advice; that Mr. T. Murray

Robinson, who was most familiar with the matter (and who, it may be noted, was the same attorney who represented the mineral owners whose application resulted in the order in question) was on vacation; that his associates were of the opinion that it would be contrary to Panoma's interests to agree to the suggested escrow agreement, but preferred to await his return before stating their objections in writing; and suggesting a different agreement, stating, "We feel that the present order will undoubtedly be sustained."

Under date of September 9, 1952, Natural wrote Panoma a second letter, identical with its letter of August 26, except that it omitted (1) the statement that its rights and the rights of its consuming public could not be adequately protected by the filing of a supersedeas bond, and (2) the suggestion for an agreed escrowing of the payments above the contract price.

Natural did appeal from the order. It was held valid in its entirety by the Supreme Court of Oklahoma April 27, 1954 [1], but on appeal to the United States Supreme Court, that Court in a per Curiam opinion [2] April 11, 1955, held the order invalid (and controlled by Phillips v. Wisconsin [3], decided on June 7, 1954) holding:

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[1] Natural Gas Pipeline Company of America v. Corporation Commission of Oklahoma (Sup. Ct. of Okla.) 272 P.2d 425.

[2] Natural Gas Pipeline Company of America v. Corporation Commission of the State of Oklahoma et al, 349 U.S. 44, 99 L. Ed. 866.

[3] Phillips Petroleum Co. v. Wisconsin, et al., 347 U. S. 672, 98 L. Ed. 1035 (June 7, 1954).

"that such a sale and transportation cannot be regulated by a state but are subject to the exclusive regulation of the Federal Power Commission."

Meantime, pending the appeal:

1. At Panoma's request, payments for gas delivered under the contract were made to the First National Bank and Trust Company of Oklahoma City, Trustee for Panoma, until those for April, May and June 1954, which were, in accordance with Panoma's instructions, made direct to it. As provided in the contract, Natural furnished Panoma each month a statement of the quantities and BTU content of gas delivered, and Panoma submitted its invoice. Panoma's invoices, beginning with that dated September 11, 1952, for gas delivered in August 1952 showed the price per M.c.f. computed at the price fixed by the State Commission's order. Natural issued its voucher check for the amount of the invoice, showing on the voucher portion the date, aggregate amount and the words, "Payment of gas purchased during the month of .....", or similar language, and transmitted it to the payee with a letter of transmittal stating:

"Such payment is, as to any part thereof in excess of that payable under the price provisions of said contract, made involuntarily and under protest with full reservation of all rights to seek restitution thereof as is more particularly set forth in our letter to Panoma Corporation dated September 9, 1952, a copy of which is attached hereto for your information."

Each such check had printed on it the words: "acceptance of this check constitutes full payment of and

settlement for the account described in the statement attached."

A schedule attached to the complaint herein, the correctness of the computation being admitted in defendant's answer, itemizes by months, from August 1952 to June 1954 inclusive, the contract price and the amount actually paid under the State Commissioner's order. It shows the aggregate contract price for the entire period to have been $6,827,[illegible].42, and the aggregate amount paid under the order $4,[illegible].71, an "excess" of $1,633,770.23 (the amount for which plaintiff sues.) It also shows a computation of interest at 6% to July 31, 1955 on the excess of each monthly payment, totaling $178,004.32.

2. Natural made certain applications to the Federal Power Commission for increased rates and for approval of revised tariff sheets, which were allowed by that Commission by orders of December 9, 1953 and March 30, 1955. It is inferable that Natural included in support of its applications the increased price it was paying Panoma. Each of the orders of the Federal Power Commission allowing the increased rates provided for a refunding by Natural to its customers, on a basis to be approved by the Commission, of any amounts recovered by it from Panoma.

3. Panoma paid its royalty owners, and the Oklahoma production tax, on the basis of the 9.8262 cent order. From August 1, 1952 to July 1, 1954 Panoma paid to its royalty owners, because of the difference between the contract price and the 9.8262 cent price actually being received from Natural extra royalty

and taxes amounting to $237,000.00, and extra Oklahoma production taxes amounting to $84,270.00. The sums so paid aggregated $321,270.00.

4. As of July 1, 1954, pursuant to an "Agreement and Plan of liquidation of Panoma Corporation", that corporation conveyed to its then stockholders, viz., the defendants herein, in stated unequal amounts, all of its assets including the contract with Natural. The major portion of these assets were simultaneously resold by defendants (to Dorchester Corporation) for $40,000,000.00 in cash and other valuable considerations. To obtain Natural's consent to this transfer, defendants made an agreement set forth in a letter dated July 1, 1954 from them to Natural, which recited the transfer of Panoma's assets in liquidation, stating that they were conveying certain of the properties referred to in Natural's letter to Panoma of September 9, 1952, and continued:

"It was understood that your execution and delivery of a certain instrument dated June 28, 1954, consenting to the assignment of the Gas Purchase Contract from Panoma Corporation to us, and from us to third persons, was contingent upon your obtaining the following agreement on our part, to-wit:

"That we hereby jointly and severally agree on behalf of ourselves, our executors, administrators and assigns to pay you or cause to be paid you any sums of money with lawful interest thereon which you are entitled to have refunded or returned with respect to the payments to Panoma Corporation in excess of the contract price made under protest referred to in said letter of September 9, 1952. We do also jointly and

severally, for ourselves, our heirs, executors, administrators and assigns agree to and do hereby acknowledge and assume any obligation imposed upon Panoma Corporation by virtue of the letter you addressed to it under date of September 9, 1952."

In this suit plaintiff seeks to recover from the defendants by way of "restitution" the difference, for the period from August 1952 to June 1954 inclusive, between the aggregate amount actually paid by it for gas delivered by Panoma referable to the contract of December 1, 1946, and the aggregate amount which would have been paid on the basis of the prices fixed by the contract, with interest at 6%. The case is now before the Court on two motions by the plaintiff, (1) a Motion to Strike certain allegations of defendants' answer as insufficient, immaterial and impertinent, and (2) a Motion for Summary Judgment.

As I have determined to render a Summary Judgment on the plaintiff's motion, I deem it unnecessary to make any formal order on its Motion to Strike.

The facts hereinabove recited are uncontroverted. It remains to consider whether or not there is a genuine issue as to some other material fact, such that evidence thereon should be heard before proceeding to judgment. In briefs and argument, defendants urge that there is such an issue as to (1) whether or not Panoma threatened to shut down its wells unless Natural paid the increased price fixed by the order of the State Commission; (2) whether or not the price fixed by contract was non-compensatory, and (3) because the remedy of restitution is equitable in nature, "all of the surrounding facts and circumstances" should be gone into.

Plaintiff alleges that Panoma, through its counsel, informed plaintiff that it expected to comply with the order, and construed it to require discontinuance of deliveries under the contract unless payments were made at the price set forth in it. The defendants deny, alleging that Panoma did not at any time threaten or inform Natural that it would discontinue any delivery.

The affidavit of Panoma's then President states that at no time did Panoma "or any of its authorized officers, agents, attorneys, or employees inform or advise Natural . . . that in the event (Natural) did not pay the amount in said price order provided or supersede same that Panoma Corporation would cease deliveries . . ." nor did Natural inquire of Panoma whether it would do so.

It appears from the affidavit of Panoma's attorney, Mr. T. Murray Robinson, that after the order was entered, Natural's attorney, Mr. Coleman Hayes, visited with him by telephone concerning the effect of said order on the relationship of Panoma and Natural, in the course of which conversation he told Mr. Hayes that in his "opinion as a lawyer, the order of the Commission would become binding unless superseded and that Panoma, like all the others, would be compelled to abide thereby", and that in his opinion "the order directed producers who were not receiving the minimum price to cease deliveries", and further that he "did not tell Mr. Hayes what Panoma would do, as I had no authority to so say."

Whether or not Panoma, in terms, threatened to discontinue deliveries if Natural did not meet the increased price, I do not consider to be of controlling materiality. It is uncontroverted that the order specifically forbade the production of gas from any well

in the field except at the price designated; that the President of Panoma, in the letter of August 30, 1952 to the President of Natural, stated that "we feel that the present order will undoubtedly be sustained by the Courts", which letter was in response to Natural's August 28, 1952 letter to Panoma stating that "you have informed us that, unless payments be made by us at the minimum price set forth in such order (instead of the price set forth in such contract) you will discontinue the delivery of gas" and contained no disavowal of such intention; that Panoma, by its Vice President, on September 9, 1952, wrote Natural that Panoma, contemplating a possible revision of the contract, would invoice Natural at 9.8262c for both the gas which was being delivered under this contract and certain other gas which was being delivered under a different contract providing a higher price, but that if the contract was not revised, "we reserve our rights to collect at a later date the difference between 9.8262c . . ." and the higher price for such other gas, which they later did; that when, on September 11, 1952 Panoma rendered its invoice to Natural for all gas delivered in August, it did so at the price fixed by the State Commission order, not at the contract price, and that it continued each month thereafter to render its statements to Natural on that basis for the gas delivered under the contract here in question. To the extent that any "threats" by Panoma might be thought to be essential to the existence of "business duress", I think the order itself, coupled with these uncontroverted facts, sufficiently show that Natural had a right to believe itself in imminent danger of having an important supply of gas interrupted if it did not accede to the order-fixed price, and that it was not discouraged in this belief by any-

thing Panoma did—if, indeed, it would have been entitled to rely even on affirmative assurances from Panoma that it would violate the terms of the order by continuing deliveries at the contract price.

As to defendants' suggestion that there exists a genuine issue of fact on the question of whether or not the contract price was non-compensatory, I do not consider that an issue material to my decision. It is not my province to determine in this proceeding what would or would not have been a fair price for gas during the period in question. This would be true had the original price been fixed by an erroneous or invalid Commission order. (See State Corporation Commission of Kansas v. Federal Power Commission.*) And is all the more true here since the price now complained of by the defendants as non-compensatory was fixed by the arms length contract of the parties themselves.

I think the suggestion that there may be other "facts and circumstances" which would make an issue in the light of the equitable character of the remedy sought by the plaintiff is too indefinite to make a genuine issue as to a material fact. Counsel in argument and in response to my questions, indicated no particular material fact or circumstance which would be disputed; none are pleaded; and I believe the suggestion relates rather to the inferences and conclusions to be drawn from the uncontroverted facts already in the record than to any real dispute of fact.

As I see it, therefore, there is no genuine issue as to any material fact; the case is one for summary judgment; and it remains to consider what judgment should be rendered. Certain collateral contentions of the parties may be first considered.

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* 215 P. 2d 176.

No.
803

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NO. 803

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957

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NATURAL GAS PIPELINE COMPANY OF AMERICA, *Petitioner*

vs.

D. D. HARRINGTON, ET AL., *Respondents*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Dated: February 15, 1958

## INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Question presented | 2 |
| Statute involved | 2 |
| Statement | 2 |
| Reasons for granting the writ | 3 |
| Conclusion | 7 |
| Appendix A—Opinion of United States Court of Appeals, Fifth Circuit | 9 |
| Appendix B—Opinion of United States District Court for Northern Division of Texas | 23 |


## CITATIONS


| | |
|---|---|
| Cases: | |
| Arkadelphia Milling Company v. St. Louis Company, 249 U.S. 134 (1919) | 3, 4 |
| Baltimore and Ohio R. Co. v. United States, 279 U.S. 781 (1929) | 3 |
| Natural Gas Pipeline Company v. Panoma Corporation 349 U.S. 44 (1955) | 2 |
| Reed v. Allen, 286 U.S. 191 (1932) | 5 |
| United Gas Pipeline Company v. Mobile Gas Service Company 350 U.S. 332 (1956) | 3, 6 |
| Other Authorities: | |
| Natural Gas Act, 15 USCA 717(c) | 6 |
| 28 USCA 1254(1) | 1 |
| Restatement, Restitution 74, Comment (d) | 6 |

# Supreme Court of the United States

OCTOBER TERM, 1957

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NO. _____

NATURAL GAS PIPELINE COMPANY OF AMERICA, *Petitioner*

vs.

D. D. HARRINGTON, ET AL., *Respondents*

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled cause on July 9, 1957.

### OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit of July 9, 1957, is not yet reported, and is printed as Appendix A hereto. The opinion of the District Court is reported in 139 F. Supp. 452, and is printed as Appendix B hereto.

### JURISDICTION

The judgment of the Court of Appeals was entered on July 9, 1957. A petition for rehearing was filed by Respondents on or about July 29, 1957, and was denied by order entered January 9, 1958. The jurisdiction of this Court is invoked under 28 USCA 1254(1).

## QUESTION PRESENTED

Whether, in an action for restitution for payments made under the duress of a void administrative order, interest on the payments may be denied for the period prior to the establishment of the invalidity of the order.

## STATUTES

No statutes are involved.

## STATEMENT

Panoma Corporation (Panoma) held gas reserves in the Guymcn-Hugoton Field in Oklahoma, subject to a contract to sell to Petitioner (a natural-gas company as defined in the Natural Gas Act), stated quantities of gas at a stated price. (T. 42-7) The Corporation Commission of Oklahoma entered an order (T.48), effective August 1, 1952, fixing a minimum price for gas produced in said field, greater than the contract price. Natural paid the price so fixed under protest. (T. 48-9) The order was held void by this Court in *Natural Gas Pipeline Company of America* v. *Panoma Corporation, et al.*, 349 U.S. 44, decided April 11, 1955.

The payments were continued under protest (T. 8-10) until July 1, 1954, when Panoma dissolved, leaving (T-41) large assets (in excess of $40,000,000) in the hands of the stockholders (the Respondents), who, for valuable consideration, agreed (T. 62-3) to discharge Panoma's obligation.[1]

The opinion below allowed restitution of the principal of the overpayments ($1,623,770.23), and allowed interest after April 11, 1955 (the date the order was held void). It denied interest from the dates on which the respective payments were made, to April 11, 1955, which Petitioner computes (T.11) at $148,109.13.

[1] The claim had two bases: one the stockholders' liability, as trustee; and one the express assumption of the stockholders.

## REASONS FOR GRANTING THE WRIT

With diffidence in attacking, on but one point, the learned opinion of the Court below, the denial of interest on the amounts paid is categorically in opposition to the decisions of this Court. In *Arkadelphia Milling Co.* v. *St. Louis Co.*, 249 U.S. 134 (1919), a case allowing restitution on the reversal of an administrative order, the opinion states (147):

> "The contention that there was error in allowing interest upon the amount of the overcharges is unsubstantial. The damage was complete *when the overcharges were made*, and as they were wrongfully made and without the consent of the shippers, *interest ran from that date on general principles.*"[2]

See also *Baltimore and Ohio R. Co.* v. *United States*, 279 U. S. 781 (1929), cited in the recent case of *United Gas Pipeline Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), wherein it was said (786):

> "• • • When the erroneous decree was reversed and the invalid order was set aside, the law raised an obligation against each of the west side roads to make restitution of the payments made by the east side roads in compliance with the order. And thereupon each of the east side roads became entitled to have the amounts so paid by it *together with interest thereon from the dates of such payments at the rate established by the law of the State in which such sums were paid.*"

The rationalization of the court below (App. A, pp. 19-20):

> "Ordinarily, a person liable to make restitution is under a duty to pay interest from the time he commits a breach of duty in failing to make restitution. Restatement of Restitution, Sec. 156(b). The duty to make restitution arose on April 11, 1955, when the Oklahoma order was declared invalid by the Supreme Court of the United States. Previous to that date, Panoma's acceptance of the increased price had been due, not to its

[2] All emphasis supplied.

fault or volition, but simply to the requirement that it comply with the order of the Oklahoma Commission, and for such period previous to April 11, 1955, we think that interest should not be allowed. See *The Claim of Jacobs* v. *Adams, Executor*, 1 Dallas 52 (U.S. 1781)."[3]

does not distinguish the decisions of this Court quoted from. It proceeds, with independence, on the thesis that the Commission's order was something imposed from without: Panoma was required[4] to take the money; ergo, it could enrich itself with the benefit of its use without liability.

There is, however, sufficient identification between Panoma and the Oklahoma Commission. The opinion itself said (App. A, p. 17):

> "Further, Harrington urges that the duress was not imposed by it but was exerted by the Oklahoma Commission. We need not stop to consider whether duress of a third person will suffice (see Restatement of Restitution, Sec 70b) for, under the circumstances, *the Oklahoma Commission was a representative of Harrington and other producers similarly situated. Arkadelphia Milling Co.* v. *St. Louis S.W. Ry. Co.*, 249 U.S. 134, 146; see, also, *United Gas Pipe Line Co.* v. *Mobile Gas Corporation*, 350 U.S. 332, 347."

The *Arkadelphia* case stated (146):

> "• • • It is a typical case for the application of the principle of restitution, and *the District Court properly held the Commission to be the representative of the shipper for this purpose.*"

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[3] The case is not a Federal case, but one from Pennsylvania. At the time, interest was just beginning to be allowed. It cites another case in the same volume, disallowing interest on an open account, because of "public welfare."

[4] The order (T.48) stated: "That no gas shall be produced • • • except at a price of not less than 9.8262¢ per thousand cubic feet • • •." Panoma would not have been in violation of the order had it refused to take the amount offered under protest, without releasing claim therefor. No one has suggested that same would have been violated, if, for example, the funds were placed in escrow.

Fundamentally, and in any event, the denial of interest is wrong, because it leaves with the beneficiary of a void order or judgment, valuable rights, to-wit, the use of money. This is unjust enrichment; there is no propriety in allowing the beneficiary of a void order to retain *any* benefits under it, or of requiring the injured party to suffer loss of the use of the money.

The jurisdiction of this Court is invoked, not alone because the opinion below directly opposes the prior decisions of this Court above cited, but also because of the importance of preserving the principle involved.

The remedy of restitution[5] is well established in the law.

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[5] See the clear summation by Mr. Justice Cordozo in *Reed* v. *Allen*, 286 U.S. 191 (1932), at 203:

"The rule is abundantly settled both in this court and elsewhere that what has been lost to a litigant under the compulsion of a judgment shall be restored thereafter, in the event of a reversal, by the litigants opposed to him, the beneficiaries of the error. * * * Two remedies exist, the one by summary motion addressed to the appellate court, the other by a plenary suit. The books show that it has long been the practice to embody in the mandate of reversal a direction that the plaintiff in error 'be restored to all things which he hath lost by occasion of the said judgment.' * * * What this was might be ascertained through an order to show cause known as a scire facias quare restitutionem habere non debit. * * * Inquiry was then made whether anything had been taken 'by colour of the judgment', * * * with an appropriate mandate for the return of anything discovered. On the other hand, the litigant who has prevailed on the appeal is not confined to a motion for summary relief. He may elect to maintain an action, or the court in its discretion may remit him to that remedy. * * * One form of remedy or the other, however, is granted as of right. The remedy in its essence like the one for money had and received is for the recovery of benefits that in good conscience may no longer be retained. 'It is one of the equitable powers inherent in every court of justice, so long as it retains control of the subject matter and of the parties, to correct that which has been wrongfully done by virture of its process.' * * * Indeed, the correction may extend to cases where the postulants for restitution are not even parties to the record. * * * The whole subject has heretofore been dealt with in a spirit of the largest liberality. The judicial process has been moulded with an anxious effort to put an end as speedily as may be to wrongs originating in judicial errors."

It is a vital procedure by which courts may establish justice in case of administrative or judicial error. Its scope includes, not alone the return of the money paid under the erroneous order or judgment, but damages for benefits enjoyed from the possession of the money while the order or judgment is under attack. Restatement, Restitution 74, Comment (d).

The remedy is widely used. (Witness its application in the recent case of *United Gas Pipeline Company* v. *Mobile Gas Service Company*, 350 U.S. 332 (1956).) The damages from loss of use of the money are usually substantial, (in this case some $148,000.00). The settled course of the law is that the beneficiary of a void judgment or order is not to have any benefit under it, including the very substantial benefit from the use of the money during the litigation. It is most inappropriate that this remedy be eroded by refusal to allow interest while the order or judgment is under appeal.

If the conclusion is allowed and becomes final in this case, the victim of a void order must lose the value of the use of the money pendente lite, unless he can reach this court. The correction of the error should not be continued to future controversy; it should be applied in this case, where the error first arose.

The ruling below is also violative of the policy of the Natural Gas Act. Had Panoma (which was in fact subject to the Natural Gas Act) filed, in order to implement the order, for an increase in rates according to the Act, and placed the rates in effect, the Commission, under the *Mobile* case, supra, would have ordered refund under Section 4(e) of the Act (15 USCA 717(c)), "with interest."

## CONCLUSION

For the reasons stated, a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE

# United States Court of Appeals

## FOR THE FIFTH CIRCUIT

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**No. 16206**

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**NATURAL GAS PIPELINE COMPANY OF AMERICA,**
**Appellant and Appellee,**

**versus**

**D. D. HARRINGTON, ET AL.,**
**Appellees and Appellants**

**(AND REVERSE TITLE).**

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***Appeals from the United States District Court for the Northern District of Texas.***

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(July 9, 1957)

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Before BORAH, RIVES and BROWN, Circuit Judges.

RIVES, Circuit Judge: Restitution was sought by Natural from Harrington[1] for the difference between the

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[1] To avoid confusion, particularly from the cross-appeals, D. D. Harrington, et al, and their predecessors in interest, Panoma Corporation, will be collectively referred to as "Harrington", and Natural Pipeline Company of America as "Natural".

contract rate for the purchase of natural gas and the price paid in compliance with an order of the Oklahoma Corporation Commission which was later declared invalid by the United States Supreme Court. The district court found Natural entitled to restitution in the sum of $1,302,491.23. It deducted from the restitution claimed $321,279.00, being $237,000.00 paid by Panoma as increased royalties and $84,279.00 paid as increased gross production taxes, and allowed no interest prior to the date of the judgment. Both Harrington and Natural appeal.

Harrington insists that Natural is not entitled to any restitution; Natural contends that the court erred as to each of the several sums deducted, and in denying it full restitution plus interest. Since the district court rendered summary judgment, we must, in examining each of the questions, determine whether there was any genuine issue as to any material fact and whether the judgment was right as a matter of law.

Judge Estes' excellent opinion, reported in 129 F.Supp. at 452, et seq., relieves us of the necessity for making more than a brief statement of the facts. Under the contract effective December 1, 1946, and to endure so long as gas is produced in paying quantities, Harrington had agreed to sell to Natural the gas produced from Harrington's wells located in some 78,000 acres of gas reserves in the Guymon-Hugoton Field in Texas County, Oklahoma, at 7 cents per m.c.f. measured at 16.4 pounds per square inch, equivalent to 6.253 cents when measured at 14.65 pounds pressure and 60 degrees Fahrenheit. On December 9, 1946, a few days after the effective date of the contract, the Oklahoma Corporation Commission entered its first order fixing a minimum price of seven cents for all gas measured at 14.65 pounds and 60 degrees Fahrenheit removed from the

Guymon-Hugoton Field. Natural refused to comply with this order, and, on May 17, 1951, the Oklahoma Commission directed Natural to pay the difference between the contract price and the seven cents minimum price. Natural posted bond and superseded the order. No payments were ever made under that first order.

On July 29, 1952, the Oklahoma Commission issued its second order increasing the minimum price to 9.8262 cents. The effective date of this order was delayed until September 10, 1952. On September 9, 1952, Natural notified Panoma, Harrington's predecessor, that it would appeal from the order and would *not* supersede, but (repeated with each payment) that it would pay the 9.8262 cents under protest, and would, upon success in the appeal, seek restitution for the amounts paid in excess of the contract price with lawful interest thereon.

Without considering the Natural Gas Act enacted by Congress in 1938, 52 Stat. 833, 15 U.S.C. §717v, the Supreme Court had in 1950 upheld the validity as against certain constitutional objections of the first Oklahoma minimum price order. *Cities Service Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179. Following the landmark case of *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, the second order was declared invalid on April 11, 1955, because "such a sale and transportation cannot be regulated by a State but are subject to the exclusive regulation of the Federal Power Commission." *Natural Gas Pipeline Co. v. Panoma Corporation, et al.*, 349 U.S. 44.

Meanwhile, on July 1, 1954, pursuant to a plan for liquidation, Panoma transferred all its assets to its stockholders, Harrington, et al., the defendants below. The consent of Natural to certain assignments of the contract

incident to such transfer was required, and, in consideration of Natural's consent, Harrington, et al., executed a letter containing the following obligation:

> "That we hereby jointly and severally agree on behalf of ourselves, our executors, administrators and assigns to pay you or cause to be paid you any sums of money with lawful interest thereon which you are entitled to have refunded or returned with respect to the payments to Panoma Corporation in excess of the contract price made under protest referred to in said letter of September 9, 1952. We do also jointly and severally, for ourselves, our heirs, executors, administrators and assigns agree to and do hereby acknowledge and assume any obligations imposed upon Panoma Corporation by virtue of the letter you addressed to it under date of September 9, 1952."

Harrington, et al. resold the major portion of the assets to third persons, and received therefor $40,000,000.00 in cash plus other valuable considerations. The restitution here sought is for claimed overpayments for gas delivered between September 10, 1952, the effective date of the second Oklahoma minimum price order, and July 1, 1954, the date of sale of Harrington's assets.

Harrington's principal defense is based upon the equitable nature of the remedy of restitution so clearly expressed by Mr. Justice Cardozo in *Atlantic Coast Line RR Co. v. Florida*, 295 U.S. 301, 309, 310. In that case, an order of the Interstate Commerce Commission requiring an increase of intrastate rates because discriminatory against interstate commerce had been set aside "solely upon the ground that the facts supporting the conclusion were not embodied in the findings" (295 U.S. 311). The Commission thereafter "looked into the past and ascertained the facts. In particular it looked into the very years covered by the claims for restitution and found the inequality and

injustice inherent in the Cummer rates during the years they were in suspense and during those they were in force." (295 U.S. 312).

> "By the time that the claim for restitution had been heard by the master and passed upon by the reviewing court, the Commission had cured the defects in the form of its earlier decision. During the years affected by the claim there existed in very truth the unjust discrimination against interstate commerce that the earlier decision had attempted to correct. If the processes of the law had been instantaneous or adequate, the attempt at correction would not have missed the mark. It was foiled through imperfections of form, through slips of procedure * * * as the sequel of events has shown them to be." 295 U.S. at pp. 311, 312.

The Supreme Court directed that the claims for restitution be dismissed, holding that the federal court "discovers through the evidence submitted to the Commission and renewed in the present record that what was charged would have been lawful as well as fair if there had been no blunders of procedure, no administrative delays." (295 U.S. at 315). See also *United States v. Morgan*, 307 U.S. 183, 196.

Harrington calls attention that in the instant case the order of the Oklahoma Commission was not invalidated on its merits, or because the rate of 9.8262 cents was unjust or unreasonable, but simply because exclusive jurisdiction was vested in the Federal Power Commission, and that that Commission, by its order of November 14, 1955, accepted as the present effective rate of Harrington's successor in interest, the same 9.8262 cents.

It should further be noted, however, that the invalidity of the order of the Oklahoma Commission was not caused by any defect or imperfection of form or slip of procedure but resulted from a total lack of jurisdiction. Fur-

ther, the Federal Power Commission by its order of November 14, 1955, spoke for the future only, and did not possess the power enjoyed by the Interstate Commerce Commission in the *Atlantic Coast Line case, supra,* of looking into the past and ascertaining the facts. Nor does any court possess such power for the purpose of fixing retroactively a just, reasonable, and lawful rate. Here the parties themselves had fixed the rate to be charged by their solemn and binding contract, and that contract rate could be changed only by the Federal Power Commission after a hearing conducted in accordance with Section 5(a) of the Natural Gas Act. *United Gas Pipe Line Co. v. Mobile Gas Corporation,* 350 U.S. 332. Moreover, in the *Atlantic Coast Line case, supra,* the railroad carrier was entitled to the protection of the order of the Interstate Commerce Commission against being required to accept the unreasonably low intrastate rates, while here the primary aim of the Natural Gas Act was "protection of consumers against exploitation at the hands of the natural gas companies." *Phillips Petroleum Co. v. Wisconsin,* 347 U.S. 672, 685 (concurring opinion of Mr. Justice Frankfurter). Even the Federal Power Commission, which had exclusive jurisdiction, could increase the contract rate only because of considerations of the public interest and not on account of any claimed right of Harrington to relief from an improvident bargain. *Federal Power Commission v. Sierra Pacific Power Co.,* 350 U.S. 348, 355.

True, in *United Gas Pipe Line Co. v. Mobile Gas Corporation, supra,* the contract was filed with the Federal Power Commission, and here it was not so filed. Section 4(c) of the Natural Gas Act provides that:

> "Under such rules and regulations as the Commission may prescribe, every natural-gas company shall

file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services."

Until the decision in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954), the parties, and indeed the Commission itself, had proceeded upon the assumption that the Commission had no regulatory jurisdiction over the rates of independent producers. After that decision, the Commission, by its Orders 174 and 174A, entered July 16, 1954 and August 6, 1954, respectively, fixed the time within which such producers could file their rates. Since the *Phillips* decision, it has become clear to all of the parties that the contract should have been filed with the Commission. The failure to file it earlier, however, did not prevent the jurisdiction of the Commission from attaching. *Interstate Natural Gas Co. v. Southern California Gas Co.*, 9th Cir., 209 F. 2d. 380, 384. There is nothing in the Natural Gas Act or in the orders of the Federal Power Commission to indicate that, under such circumstances, until the rates were filed there was *no* effective or lawful rate. To the contrary, the Act expressly provided for delay in such filing, and under the rationale of *United Gas Pipe Line Co. v. Mobile Gas Corporation, supra,* the contract rate, even though unfiled, became and remained the only lawful rate until changed by order of the Federal Power Commission. Any price in excess of the contract rate was then contrary to the spirit, if not the letter, of the Natural Gas Act.

Harrington insists, however, that the excess payments were voluntarily made by Natural, or at least that there was a genuine issue of fact as to whether they were involuntarily made under coercion of "business duress." Natural, of course, concedes that restitution will not lie if the excess payments were voluntarily made.[2] Further, duress or coercion must exist, and the written protest does not, by itself, make the payments involuntary. *Union Pacific RR Co. v. Dodge County Commissioners,* 98 U.S. 541, 544; *Bank of United States v. Bank of Washington,* 6 Pet. 8, 12 (U.S. 1832).

The order of the Oklahoma Commission directed,

> "That no gas shall be produced from any well located in the Guymon-Hugoton Field of Oklahoma except at a price of not less than 9.8262c per thousand cubic feet if sold at the wellhead or on the lease or drilling unit from which produced, or a price equivalent to not less than 9.8262c per thousand cubic feet at the wellhead if sold off the lease or drilling unit or otherwise utilized."

Assuming validity of the order, its violation carried criminal sanctions under an Oklahoma Statute (O.S., Title 52, Sec. 278) providing for a fine of not to exceed $5,000.00 or imprisonment in the county jail for not more than thirty days, or both such fine and imprisonment on those who violate its conservation laws. Mr. T. Murray Robinson, counsel for Panoma, Harrington's predecessor, filed an affidavit in which he conceded:

> "That after said order was entered, Mr. Coleman Hayes, who represented Natural Gas Pipeline Company of America in said proceedings, visited with me by telephone concerning the effect of said order on the

[2] For the basic reason of that rule, see 40 Am.Jur., Payment, Sec. 158.

relationship of Panoma and Natural. In the course of that conversation I told Mr. Hayes that in my opinion as a lawyer the order of the Commission would become binding unless superseded and that Panoma, like all others, would be compelled to abide thereby, and that in my opinion the order directed producers who were not receiving the minimum price to cease deliveries."

Scant respect would be accorded to the laws of the State of Oklahoma, if it were held that Natural had to go further and speculate on whether Panoma actually would have ceased delivering gas if Natural had refused to pay the increased price.

Natural candidly admits that it was motivated not to supersede the order by its desire to seek from the Federal Power Commission increases reflecting the prices paid under the order, and thus to pass on the increase rather than itself bearing the entire risk. We do not agree with Harrington that such motive converted Natural's payment of the increased rate into a "calculated business maneuver." If anything, the choice between bearing the entire risk of loss and trying to pass it on increased the business duress on Natural to make payments in accordance with the order. See *Union Pacific RR Co. v. Public Service Commission*, 248 U.S. 67, 70.

Further, Harrington urges that the duress was not imposed by it but was exerted by the Oklahoma Commission. We need not stop to consider whether duress of a third person will suffice (see Restatement of Restitution, Sec. 70b) for, under the circumstances, the Oklahoma Commission was a representative of Harrington and other producers similarly situated. *Arkadelphia Milling Co. v. St. Louis S.W. Ry. Co.*, 249 U.S. 134, 146; see, also, *United Gas Pipe Line Co. v. Mobile Gas Corporation*, 350 U.S. 332, 347.

Harrington urges that an accord and satisfaction was effected by Panoma's acceptance of Natural's checks containing notations similar to that copied in the margin.[3] It is elementary, however, that an accord and satisfaction can result only from an agreement, and, clearly, Natural made no offer of any agreement that would preclude it from seeking restitution when each of its checks was accompanied by a letter specifically renewing its protest as follows:

> "Such payment is, as to any part thereof in excess of that payable under the price provisions of said contract, made involuntarily and under protest with full reservation of all rights to seek restitution thereof as is more particularly set forth in our letter to Panoma Corporation dated September 9, 1952, a copy of which is attached hereto for your information."

We are in full agreement with the conclusion reached by the learned district judge that Natural is entitled to restitution.

The district court, however, denied Natural's claim for restitution in the sum of $321,279.00 representing payments made by Panoma, Harrington's predecessor, for increased royalties and increased production taxes. We have held that Panoma had no right to the increased price. It took the same with notice that the rights of all who were to share in such increase were disputed by Natural. It could not voluntarily pay its royalty owners and its taxes on the basis of the increased price at Natural's expense, when the validity of the increase was in dispute *Ward v. Love County*, 253 U.S. 17, 24.

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[3] "Acceptance of this check constitutes full payment of and settlement for the account described on the statement attached * * *

. . . . . .

Payment of gas purchased on original and supplemental contracts from June 23, 1954 to 10:00 A.M. July 1, 1954."

We think that the state law provided adequate means by which Panoma could have withheld the increased payments from its royalty owners until the termination of the litigation, or could have paid under protest with a right of recovery, or could reserve the right to itself or its successors to take credit for any overpayment against future royalties. Panoma received the increase in price for the use and benefit of Natural, but it made no effort to protect Natural's interest.

Like considerations are applicable to the payments of taxes on the basis of the increased price. Additionally, it may be noted that Title 68, Section 1475 of the Oklahoma Statutes, 1951, provides for the payment of taxes under protest and their subsequent recovery. Indeed, the Fourteenth Amendment itself would prevent the state from collecting unlawful taxes by coercive means without incurring any obligation to pay them back. *Ward v. Love County*, 253 U.S. 17, 24. We hold, therefore, that the district court erred in denying Natural's claim for restitution to the extent of $321,279.00.

We agree with the district court that the clear intent of the letter of the stockholders, Harrington, et al., incident to Panoma's liquidation (see page 4, ante) was to assume the same liability that rested upon Panoma. We think, however, that its use of the expression "with lawful interest" referred to interest from and after the time when Natural might become entitled to restitution from such stockholders in lieu of Panoma. Ordinarily, a person liable to make restitution is under a duty to pay interest from the time he commits a breach of duty in failing to make restitution. Restatement of Restitution, Sec. 156(b). The duty to make restitution arose on April 11, 1955, when the Oklahoma order was declared invalid by the Supreme

Court of the United States. Previous to that date, Panoma's acceptance of the increased price had been due, not to its fault or volition, but simply to the requirement that it comply with the order of the Oklahoma Commission, and for such period previous to April 11, 1955, we think that interest should not be allowed. See *The Claim of Jacobs v. Adams, Executor*, 1 Dallas 52 (U.S. 1781).

The district court denied the recovery of any interest, without seeking to take advantage of its discretionary power to refuse interest (*Okeechobee County, Florida v. Nuvecn*, 145 F. 2d. 684, 687), but fully and fairly stating the reasons for such denial.[4] Each of those reasons was known to the parties on July 1, 1954, when Harrington, et al. agreed to pay Natural "any sums of money with lawful interest thereon which you are entitled to have refunded or returned with respect to the payments to Panoma Corporation in excess of the contract price made under protest referred to in said letter of September 9, 1952." Further, with deference, we disagree with the reasons assigned by the learned district judge. In our opinion, no duty rested on Natural to supersede the order, Natural's suggestion of an escrow arrangement should not prejudice its right to interest, and though it had received increased rates from its customers, such increase was granted subject

[4] "As to the matter of interest, I have concluded that it is just and equitable, under the circumstances of this case, to deny plaintiff's claim for interest. In so concluding, I have taken into account all the facts and circumstances before me, including the fact that Natural could have superseded the operation of the order as to this gas, and kept the use of the money, by filing a mere undertaking without surety or penal amount (as did Northern Natural Gas Company); that it was willing to waive interest if Panoma would agree to the escrowing of the excess payments; and that for most of the period in question it has been able to recoup the excess payments by increased rates to its customers, so that it has not in fact been deprived of the use of the money."

to the provision recited in the order of the Federal Power Commission, that if Natural be successful in the litigation, " * * * it will refund to its utility customers, on a basis to be approved by the Commission, the sum or sums so recovered."

Finally, we find that there was no genuine issue as to any material fact and that Natural was entitled to judgment as a matter of law. Rule 56(c), Federal Rules of Civil Procedure. While the judgment might be affirmed in the part complained of in Harrington's appeal and reversed in the part complained of in Natural's appeal, it is simpler, we think, to vacate the entire judgment and remand the cause with directions to enter judgment in accordance with this opinion in favor of the plaintiff against the defendants for the sum of $1,623,770.23, together with interest at 6 per cent per annum from April 11, 1955 on such sum or any portions thereof remaining unpaid down to the date of payment, and with costs, and it is so ordered. The costs of this appeal are taxed against D. D. Harrington, et al.

VACATED AND REMANDED.

APPENDIX B

IN THE

# District Court of the United States

FOR THE NORTHERN DISTRICT OF TEXAS

AMARILLO DIVISION

NATURAL GAS PIPELINE COMPANY OF AMERICA, a corporation,
*Plaintiff*

v.

D. D. HARRINGTON, ET AL,
*Defendants*

CIVIL ACTION No. 2070

Plaintiff seeks restitution for the difference in its contract rate for the purchase of gas and the price paid under an invalid minimum rate order of the Oklahoma Corporation Commission. Plaintiff has moved for summary judgment.

The uncontroverted facts in this case are as follows:

Defendants and others under the firm name of Harrington and March, called "Sellers", being the owners of mineral leases covering 78,000 acres of land in the Guyman-Hugoton gas field, in the County of Texas and State of Oklahoma, entered into a "Gas Purchase Contract" effective December 1, 1946, with plaintiff, herein called "Natural", an interstate pipeline transporter of natural gas, whereby it was agreed that (1) Natural would expand its facilities, including construction of certain pipelines and a compressor station at a point designated in the contract; (2) Sellers would drill wells, install gathering lines, construct a gasoline and dehydration plant, etc., and maintain and operate their property so as to make available for delivery the agreed quantities of gas; (3) Sellers would sell and deliver to Natural, and Natural would purchase and receive from Sellers stipulated quantities of gas per day;

(4) said gas would be delivered to Natural at the intake side of its compressor station and by it compressed and redelivered to Sellers at Sellers' gasoline plant, where Sellers would remove certain constituents, including liquid hydrocarbons; (5) Sellers would redeliver the residue gas to Natural at its meter station near the outlet side of Sellers' plant, at which point title should pass to Natural; (6) Natural would pay for each thousand cubic feet of gas delivered, a base price (with certain adjustments for BTU's) of (a) until July 1, 1951, six cents, and (b) for five years thereafter, seven cents, the quantity delivered to be measured at a base temperature of 60° F. and an absolute pressure of 16.4 pounds per square inch (which prices are equal to 5.35974 cents and 6.253 cents per M.c.f. respectively for gas measured at 14.65 pounds pressure) with a slightly different price provision applying to gas used for fuel by Natural in its compressor station.

As to payment, the contract provided that Natural would render monthly statements to Seller showing the quantities of gas delivered, with supporting data, whereupon Sellers would render an invoice for such gas, and Natural would make payment; that if Natural should fail to pay any amount due, to the extent not in bona fide dispute, for a period of sixty days after its due date, Sellers could suspend deliveries of gas until such payment was made; that any statement or invoice was to be subject to correction within one year after payment made by Natural for gas delivered during any calendar month, but if claim for correction was not made within that time, such statement and invoice would become final as to both parties; that Natural might at its option make payments of any amounts due by deposit to Sellers' "credit in the First National Bank and Trust Company of Oklahoma City".

It was further provided that:

> "This contract is subject to present and future valid laws and present and future lawful orders of all regulatory bodies now or hereafter having jurisdiction over the parties; and should at any time during the term of this contract either party, by force of any such law or regulation imposed, be ordered or required to do any act inconsistent with the provisions of this contract, the contract shall, subject to the other provisions hereof, continue nevertheless, but shall be deemed modified to conform with the requirements of such law or regulation."

It recited, among other things, that Natural contemplated the expenditure of large sums of money in the construction of pipe lines to Sellers' properties and:

> "because of such expenditures and because the nature of its business requires assurance that the gas reserves of Seller shall be continuously available to Natural during the entire period of this contract, the parties agree: that the provisions hereof shall be deemed covenants running with . . . the property . . ."

Deliveries of gas under the contract commenced in small quantities in August 1948. On about October 1, 1948, Panoma Corporation was created by the members of the Harrington and Marsh partnership, and the gas properties, together with all rights under the contract, were transferred to it. Deliveries by it of gas in substantial quantities commenced in November 1948, and continued thereafter.

This contract was an important one to both parties, and on August 1, 1952 and thereafter, the gas deliverable under it constituted a substantial portion of Natural's source of supply.

Under date of July 29, 1952, Oklahoma Corporation Commission (herein referred to as the State Commission), upon:

> "application of certain mineral owners in Texas County, Oklahoma, for an order determining the minimum price at which gas in the Guyman-Hugoton Field may be first purchased or sold",

entered its order No. 26096, providing that:

> "No gas shall be produced from any well located in the Guyman-Hugoton Field of Oklahoma except at a price of not less than 9.8262¢ per thousand cubic feet at the wellhead. . . . If the gas is processed for extraction of liquid hydrocarbons and sold during or at the conclusion of gathering, the price for the residue gas shall be not less than 9.8262¢ per thousand cubic feet" (with certain adjustments for BTU content).

Under this order gas was to be measured at 14.65 pounds per square inch absolute. Its effective date, August 1, 1952, was temporarily stayed by Commission order of July 31, 1952, until September 10, 1952,

> "during which time the appealing parties and all other parties interested who desire to further stay the enforcement of said order may file herein their supersedeas bonds, said bonds to be approved by the Commission."

A further hearing was had on September 10, 1952 to consider the "terms, conditions and amounts" of supersedeas bonds. No supersedeas bond was filed or proffered by Natural or Panoma. Such a supersedeas was filed by another pipeline company (Northern Natural), which is material here only as indicating one form of "bond" which was acceptable to the Commission. It constituted merely an undertaking, without surety, to perform "all things that may duly and legally be enjoined upon it by said order in case said order shall be finally affirmed in whole or in part."

It appears from the affidavit of the attorney who represented the mineral owner applicants for the order that this was a form of "bond" agreed to by him, and that if requested, he, as attorney for these mineral owners, would have agreed to the same form of bond for Natural.

Under date of August 26, 1952, Natural wrote Panoma, referring to Order No. 26096, and stating among other things:

> "You have informed us that you interpret such order as applying to the gas sold by Panoma to this Company . . . and have also informed us that, unless payments be made by us at the minimum price set forth in such order (instead of the price set forth in such contract), you will discontinue the delivery of gas . . . to us in accordance with the provisions of such contract. . . ."

The letter continued that Natural denied that the order could lawfully be applied to their gas; that it had filed notice of appeal, which it would prosecute; that pending final adjudication it was necessary that the gas be delivered to Natural in order that it might fulfill its obligations to its customers and provide supplies of gas to consuming areas served by it in accordance with its certificates of public convenience and necessity; that it could not replace said gas from any other source, on any reasonable basis; that its rights and the rights of its consuming public could not be adequately protected through the filing of a supersedeas bond; that it was necessary that its rights be protected and preserved pending the appeal; and stated:

> "Natural will therefore, each month, upon receipt of proper accounting statements, pay in accordance with the contract price and, in addition thereto, will make payments for the difference between such contract price and the price fixed by the Commission for such gas in said order.

"Payments of all sums in excess of the contract price, however, will be made involuntarily and under protest because of the compulsion and coercion resulting from the threat of the order itself and your interpretation of such order as prohibiting you from producing and delivering such gas to Natural under said contract at a price less than the minimum price fixed by the Commission in such order.

"You will understand, of course, that each payment of such difference is and will be made involuntarily and under protest without an express repetition of the protest and the grounds thereof at the time of each payment. In the event such order shall be held invalid or inapplicable to the gas sold and delivered by you to us under such contract, Natural will assert the right under familiar doctrines of business compulsion, unjust enrichment and restitution to a return to Natural of the additional payments so made under protest, with lawful interest thereon."

It further suggested that by agreement the "additional amounts" be held in escrow by the bank pending final determination as to the order, all claims for interest to be waived.

Under date of August 30, 1952, the President of Panoma wrote the President of Natural, on the letterhead of Panoma, stating that Natural's letter had been submitted to "our attorneys" in Oklahoma City for recommendation and advice; that Mr. T. Murray Robinson, who was most familiar with the matter (and who, it may be noted, was the same attorney who represented the mineral owners whose application resulted in the order in question) was on vacation; that his associates were of the opinion that it would be contrary to Panoma's interests to agree to the suggested escrow agreement, but preferred to await his return before stating their objections in writing; and suggesting

a different agreement, stating, "We feel that the present order will undoubtedly be sustained."

Under date of September 9, 1952, Natural wrote Panoma a second letter, identical with its letter of August 26, except that it omitted (1) the statement that its rights and the rights of its consuming public could not be adequately protected by the filing of a supersedeas bond, and (2) the suggestion for an agreed escrowing of the payments above the contract price.

Natural did appeal from the order. It was held valid in its entirety by the Supreme Court of Oklahoma April 27, 1954[1], but on appeal to the United States Supreme Court, that Court in a per Curiam opinion[2] April 11, 1955, held the order invalid, (and controlled by *Phillips v. Wisconsin*[3], decided on June 7, 1954) holding:

> "that such a sale and transportation cannot be regulated by a state but are subject to the exclusive regulation of the Federal Power Commission."

Meantime, pending the appeal:

1. At Panoma's request, payments for gas delivered under the contract were made to the First National Bank and Trust Company of Oklahoma City, Trustee for Panoma, until those for April, May and June 1954, which were, in accordance with Panoma's instructions, made direct to it. As provided in the contract, Natural furnished Panoma each month a statement of the quantities and BTU content of gas delivered, and Panoma submitted its invoice. Pano-

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[1] Natural Gas Pipeline Company of America v. Corporation Commission of Oklahoma (Sup. Ct. of Okla.) 272 P. 2d 425.

[2] Natural Gas Pipeline Company of America v. Corporation Commission of the State of Oklahoma et al, 349 U.S. 44, 99 L. Ed. 866.

[3] Phillips Petroleum Co. v. Wisconsin, et al, 347 U.S. 672, 98 L. Ed. 1035 (June 7, 1954).

ma's invoices, beginning with that dated September 11, 1952, for gas delivered in August 1952 showed the price per M.c.f. computed at the price fixed by the State Commissioner's order. Natural issued its voucher check for the amount of the invoice, showing on the voucher portion the date, aggregate amount and the words, "Payment of gas purchased during the month of ", or similar language, and transmitted it to the payee with a letter of transmittal stating:

> "Such payment is, as to any part thereof in excess of that payable under the price provisions of said contract, made involuntarily and under protest with full reservation of all rights to seek restitution thereof as is more particularly set forth in our letter to Panoma Corporation dated September 9, 1952, a copy of which is attached hereto for your information."

Each such check had printed on it the words: "acceptance of this check constitutes full payment of and settlement for the account described in the statement attached."

A schedule attached to the complaint herein, the correctness of the computation being admitted in defendant's answer, itemizes by months, from August 1952 to June 1954 inclusive, the contract price and the amount actually paid under the State Commission's order. It shows the aggregate contract price for the entire period to have been $2,827,656.48, and the aggregate amount paid under the order $4,451,426.71, an "excess" of $1,623,770.23 (the amount for which plaintiff sues). It also shows a computation of interest at 6% to July 31, 1955 on the excess of each monthly payment, totaling $178,004.32.

2. Natural made certain applications to the Federal Power Commission for increased rates and for approval of revised tariff sheets, which were allowed by that Commission by orders of December 9, 1953 and March 30, 1955.

It is inferable that Natural included in support of its applications the increased price it was paying Panoma. Each of the orders of the Federal Power Commission allowing the increased rates provided for a refunding by Natural to its customers, on a basis to be approved by the Commission, of any amounts recovered by it from Panoma.

3. Panoma paid its royalty owners, and the Oklahoma production tax, on the basis of the 9.8262 cent order. From August 1, 1952 to July 1, 1954 Panoma paid to its royalty owners, because of the difference between the contract price and the 9.8262 cent price actually being received from Natural extra royalty and taxes amounting to $237,000.00, and extra Oklahoma production taxes amounting to $84,279.00. The sums so paid aggregated $321,279.00.

4. As of July 1, 1954, pursuant to an "Agreement and Plan of liquidation of Panoma Corporation", that corporation conveyed to its then stockholders, viz., the defendants herein, in stated unequal amounts, all of its assets including the contract with Natural. The major portion of these assets were simultaneously resold by defendants (to Dorchester Corporation) for $40,000,000.00 in cash and other valuable considerations. To obtain Natural's consent to this transfer, defendants made an agreement set forth in a letter dated July 1, 1954 from them to Natural, which recited the transfer of Panoma's assets in liquidation, stating that they were conveying certain of the properties referred to in Natural's letter to Panoma of September 9, 1952, and continued:

> "It was understood that your execution and delivery of a certain instrument dated June 25, 1954, consenting to the assignment of the Gas Purchase Contract from Panoma Corporation to us, and from us to third persons, was contingent upon your obtaining the following agreement on our part, to-wit:

"That we hereby jointly and severally agree on behalf of ourselves, our executors, administrators and assigns to pay you or cause to be paid you any sums of money with lawful interest thereon which you are entitled to have refunded or returned with respect to the payments to Panoma Corporation in excess of the contract price made under protest referred to in said letter of September 9, 1952. We do also jointly and severally, for ourselves, our heirs, executors, administrators and assigns agree to and do hereby acknowledge and assume any obligation imposed upon Panoma Corporation by virtue of the letter you addressed to it under date of September 9, 1952."

In this suit plaintiff seeks to recover from the defendants by way of "restitution" the difference, for the period from August 1952 to June 1954 inclusive, between the aggregate amount actually paid by it for gas delivered by Panoma referable to the contract of December 1, 1946, and the aggregate amount which would have been paid on the basis of the prices fixed by the contract, with interest at 6%. The case is now before the court on two motions by the plaintiff, (1) a Motion to Strike certain allegations of defendants' answer as insufficient, immaterial and impertinent, and (2) a Motion for Summary Judgment.

As I have determined to render a Summary Judgment on the plaintiff's motion, I deem it unnecessary to make any formal order on its Motion to Strike.

The facts hereinabove recited are uncontroverted. It remains to consider whether or not there is a genuine issue as to some other material fact, such that evidence thereon should be heard before proceeding to judgment. In briefs and argument, defendants urge that there is such an issue as to (1) whether or not Panoma threatened to shut down its wells unless Natural paid the increased price fixed by

the order of the State Commission; (2) whether or not the price fixed by contract was non-compensatory, and (3) because the remedy of restitution is equitable in nature, "all of the surrounding facts and circumstances" should be gone into.

Plaintiff alleges that Panoma, through its counsel, informed plaintiff that it expected to comply with the order, and construed it to require discontinuance of deliveries under the contract unless payments were made at the price set forth in it. The defendants deny, alleging that Panoma did not at any time threaten or inform Natural that it would discontinue any delivery.

The affidavit of Panoma's then President states that at no time did Panoma "or any of its authorized officers, agents, attorneys, or employees inform or advise Natural . . . that in the event (Natural) did not pay the amount in said price order provided or supersede same that Panoma Corporation would cease deliveries . . ." nor did Natural inquire of Panoma whether it would do so.

It appears from the affidavit of Panoma's attorney, Mr. T. Murray Robinson, that after the order was entered, Natural's attorney, Mr. Coleman Hayes, visited with him by telephone concerning the effect of said order on the relationship of Panoma and Natural, in the course of which conversation he told Mr. Hayes that in his "opinion as a lawyer, the order of the Commission would become binding unless superseded and that Panoma, like all the others, would be compelled to abide thereby", and that in his opinion "the order directed producers who were not receiving the minimum price to cease deliveries", and further that he "did not tell Mr. Hayes what Panoma would do, as I had no authority to so say."

Whether or not Panoma, in terms, threatened to discon-

tinue deliveries if Natural did not meet the increased price, I do not consider to be of controlling materiality. It is uncontroverted that the order specifically forbade the production of gas from any well in the field except at the price designated; that the President of Panoma, in the letter of August 30, 1952 to the President of Natural, stated that "we feel that the present order will undoubtedly be sustained by the courts", which letter was in response to Natural's August 26, 1952 letter to Panoma stating that "you have informed us that, unless payments be made by us at the minimum price set forth in such order (instead of the price set forth in such contract) you will discontinue the delivery of gas" and contained no disavowal of such intention; that Panoma, by its Vice President, on September 9, 1952, wrote Natural that Panoma, contemplating a possible revision of the contract, would invoice Natural at 9.8262¢ for both the gas which was being delivered under this contract and certain other gas which was being delivered under a different contract providing a higher price, but that if the contract was not revised, "we reserve our rights to collect at a later date the difference between 9.8262¢ . . ." and the higher price for such other gas, which they later did; that when, on September 11, 1952 Panoma rendered its invoice to Natural for all gas delivered in August, it did so at the price fixed by the State Commission order, not at the contract price, and that it continued each month thereafter to render its statements to Natural on that basis for the gas delivered under the contract here in question. To the extent that any "threats" by Panoma might be thought to be essential to the existence of "business duress", I think the order itself, coupled with these uncontroverted facts, sufficiently show that Natural had a right to believe itself in imminent danger of having an important supply of gas interrupted if it

did not accede to the order-fixed price, and that it was not discouraged in this belief by anything Panoma did—if, indeed, it would have been entitled to rely even on affirmative assurances from Panoma that it would violate the terms of the order by continuing deliveries at the contract price.

As to defendants' suggestion that there exists a genuine issue of fact on the question of whether or not the contract price was non-compensatory, I do not consider that an issue material to my decision. It is not my province to determine in this proceeding what would or would not have been a fair price for gas during the period in question. This would be true had the original price been fixed by an erroneous or invalid Commission order. (See *State Corporation Commission of Kansas* v. *Federal Power Commission*.[4]) And is all the more true here since the price now complained of by the defendants as non-compensatory was fixed by the arms length contract of the parties themselves.

I think the suggestion that there may be other "facts and circumstances" which would make an issue in the light of the equitable character of the remedy sought by the plaintiff is too indefinite to make a genuine issue as to a material fact. Counsel in argument and in response to my questions, indicated no particular material fact or circumstance which would be disputed; none are pleaded; and I believe the suggestion relates rather to the inferences and conclusions to be drawn from the uncontroverted facts already in the record than to any real dispute of fact.

As I see it, therefore, there is no genuine issue as to any material fact; the case is one for summary judgment; and it remains to consider what judgment should be ren-

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[4] 215 P. 2d 176.

dered. Certain collateral contentions of the parties may be first considered.

1. Plaintiff contends that the defendants' letter of July 1, 1954, unconditionally bound them to repay the excess payments sued for, with interest, if the order should be held invalid. I do not agree. I construe the letter only to bind the defendants to pay whatever plaintiff would be entitled to recover against Panoma, and that the questions as to recovery *vel non*, and the amount of any recovery, are the same as they would be were Panoma the defendant.

2. Defendants contend that there was an accord and satisfaction as to the amount due for gas each month, and point (1) to the printed notation on the face of each of Natural's checks reading "acceptance of this check constitutes full payment of and settlement for the account described on the statement attached" and the written notation on the voucher portion of each check to the effect that it was for payment of gas purchased under the contract for a particular month, and (2) to the provisions of the contract that any statement or invoice should be subject to correction within one year but should become final "if claim for correction is not made within that time." Each of Natural's checks was accompanied by a letter renewing its rights to such restitution as set forth in its letter of September 9, 1952. It seems clear that there was no accord and satisfaction, and that the parties did not so intend.

3. Defendants contend that to permit Natural to recover the difference between the contract price and what it paid for the gas pursuant to the invalid order would be enforcing the price provisions of the contract as the rate for gas during the period in question, whereas it is now known that Panoma was a natural gas company within the provisions of the Natural Gas Act, whose rates could only be valid after filing with

the Federal Power Commission; that the contract never having been so filed, its provisions as to price were ineffective. Admittedly, neither of the parties supposed at that time that Panoma was required to file its rate schedules (contracts) with the Federal Power Commission, and it is a matter of common knowledge that that Commission itself did not know or believe that it had jurisdiction over the prices charged by gas producers for their product until after the decision in *Phillips* v. *Wisconsin*, June 1954.[3] To say now that Panoma, regardless of knowledge or lack of it, was under the legal duty to file its rates (viz., its contract) with the Commission and that its failure to do so had the effect of preventing the price provisions of its private contract from becoming binding as between the parties is highly technical and without merit in determining the equities of the parties. The authorities cited by the defendants do not require such a holding. I am not here concerned with the proposition that the parties could not by their contract oust the Federal Power Commission of its power to determine the lawfulness of rates. During the period here involved the Commission has not determined the contract rates applicable to this gas unlawful, nor prescribed a change therein. I decline to follow the defendants' contention in this respect. See *Mobile Gas Service Corp.* v. *Federal Power Commission*,[5] citing *Colorado Inter-*

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[3] Phillips Petroleum Co. v. Wisconsin, et al, 347 U.S. 672, 98 L. Ed. 1035 (June 7, 1954).

[5] Mobile Gas Service Corp. v. Federal Power Commission, 215 F. 2d 883, U.S. , affirmed by opinion of the Supreme Court Feb. 27, 1956 in cases Nos. 17 (United Gas Co. v. Mobile Gas Corp.) and 31 (F.P.C. v. Mobile Gas Corp.)—Oct. Term 1955, in which Justice Harlan's opinion states:

"... we hold that the Natural Gas Act does not give natural gas companies the right to change their rate contracts by their own unilateral action. . . .

"From our conclusion that the Natural Gas Act gives a natural gas company no power to change its contracts unilaterally, it fol-

*state Gas Company* v. *Federal Power Commission.*[5]

4. Defendants further contend that recovery by plaintiff is barred (a) because Natural could have superseded the order of the State Commission and did not, (b) because Natural, by obtaining orders of the Federal Power Commission for increased rates, passed on to its customers the excess payments to Panoma, and (c) by the two year statute of limitations. I have carefully considered each of these contentions, and find them to be without merit. The remedy of "restitution" originated in the field of judgments paid and later reversed, and there could be no occasion for its application in a case where the judgment had been superseded. With respect to judgments, it is said in *Restatement of the Law*,

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lows that the new schedule filed by United was a nullity insofar as it purported to change the rate set by its contract with Mobile and that the contract rate remained the only lawful rate. . . . Any amounts paid by Mobile in excess of the contract rates on the basis of the erroneous order of the Commission were therefore unlawfully collected, and United is obligated to make restitution of the excess payments. Cf. Baltimore & Ohio R. Co. v. United States, 279 U.S. 781."

Justice Harlan's opinion in cases Nos. 51 (F.P.C. v. Sierra Pacific Power Co.) and 53 (Pacific Gas Co. v. Sierra Pacific Power Co.) dated Feb. 27, 1956, affirming 223 F. 2d 605, construing provisions of the Federal Power Act virtually identical to the Natural Gas Act, states:

". . . The Commission has undoubted power . . . to prescribe a change in contract rates whenever it determines such rates to be unlawful. While this power is limited to prescribing the rate 'to be thereafter observed' and thus can effect no change prior to the date of the order. . . ."

". . . But while it may be that the Commission may not normally *impose* upon a public utility a rate which would produce less than a fair return, it does not follow that the public utility may not itself agree by contract to a rate affording less than a fair return or that, if it does so, it is entitled to be relieved of its improvident bargain. Cf. Arkansas Natural Gas Co. v. Railroad Comm'n, 261 U.S. 379.

[5] Colorado Interstate Gas Company v. Federal Power Commission, 142 F. 2d 943, affirmed 324 U.S. 581.

*Restitution*, Sec. 74 (p. 304)[7] that "anything paid by way of settlement can be recovered . . . although the payer could have obtained a supersedeas." No reason is perceived why Natural owed any duty to Panoma to supersede the order. The suggestion that because it could have superseded, it was not put under any "business duress" by the order, if valid, would apply as well in principle to the field of judgments. As to the "passing on" by Natural to its customers, I do not consider that its rights in this suit are affected thereby, especially in view of the fact that the Federal Power Commission's orders granting it increased rates especially provide for refunds by it to its customers, of whatever amounts it should recover from Panoma. And as to the statute of limitations, the cause of action (for restitution) here asserted did not arise until the event happened on which the right to it depended, viz., the final determination of the invalidity of the State Commission's order, which was not until April 11, 1955, less than five months prior to the commencement of this action. (Baltimore and Ohio Ry. Co. v. U.S.[8]). Accordingly, I hold against the defendants on each of these contentions.

This narrows the matter down to the controlling issues of law, viz., is Natural entitled, under the facts, to the remedy of restitution, and if so, is it entitled to recover the entire amount sued for, or are there countervailing reasons, equitable and otherwise, for limiting its recovery to a lesser amount?

I have heretofore indicated my conclusion that in making the "excess" payments Natural involuntarily did so under the coercion of "business duress." It was confronted with

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[7] Restatement of the Law, Restitution Sec. 74, (p. 304).

[8] Baltimore and Ohio R.R. Co. v. U.S., 279 U.S. 781, cited in the Supreme Court opinion in the Mobile case, Note 5 supra.

an apparently valid order of the State Commission which in terms forbade its supplier from supplying gas to it unless it paid the designated price. If it refused to pay, enforcement of the order would subject it to very great loss. If the order was valid, refusal to pay might be a violation of its own contract. A prior price-fixing order of the same Commission (the so-called 7-cent order of December 9, 1946) had been held valid, as against constitutional objections, by the Supreme Court.[9] [10] Natural certainly would not have been justified in ignoring the order or assuming it to be invalid. Defendants now assert that Natural should have known that Panoma would not comply with the order, because shutting down its wells would have shut off its own supply of gas for processing in its plant. Panoma's attitude at the time did not indicate that it intended to defy the order. It was quite to the contrary. But I doubt that even assurances from it that it would do so would have entirely eliminated the coercion resulting from the order itself, containing within its own terms the implication that the State Commission would exercise its powers of enforcement. While Natural's letters to Panoma of August 26 and September 9, 1952, and its continued reiteration that it was making the excess payments under protest, could not of themselves create a cause of action for restitution, they made it clear, and make it clear now, that Natural considered itself to be paying under coercion and that Panoma was so continually and unequivocally informed.

The remedy of "restitution" is a branch of the more general "money had and received," which is based on the proposition that where one has received money from another un-

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[9] Cities Service Gas Co. v. Peerless Oil and Gas Co., 340 U.S. 179, 95 L. Ed. 190 (Dec. 11, 1950).

[10] Phillips Petroleum Co. v. Oklahoma, 340 U.S. 190, 95 L. Ed. 204.

der such circumstances as to make it unjust and inequitable for him to retain it, he may be required to restore it. In general, and with limitations, "a person who has been unjustly enriched at the expense of another is required to make restitution to the other." *Restatement of the Law, Restitution*, p. 12. So, "what has been lost to a litigant under the compulsion of a judgment shall be restored thereafter, in the event of a reversal, by the litigants opposed to him, the beneficiaries of the error". (See dissenting opinion of Justice Cardozo in *Reed* v. *Allen*.[11]) If taxes have been paid under the duress of an unconstitutional act, they may be recovered. *State* v. *Akin Products Co.*[12] In the case cited, the Texas Supreme Court adopted the opinion of the Court of Civil Appeals, including the following language from *Crow* v. *City of Corpus Christi*[13]:

> "The early common-law doctrine of duress has been expanded (17 Am. Jur. p. 875) and many courts have adopted the modern doctrine of 'business compulsion' under which 'it is established that where by reason of the peculiar facts a reasonably prudent man finds that in order to preserve his property or protect his business interest it is necessary to make a payment of money which he does not owe and which in equity and good conscience the receiver should not retain, the payment may be recovered.' 40 Am. Jur. p. 831."

The principle of business duress has been applied to permit recovery of payments made under compulsion of an administrative order later held invalid. *Baltimore and Ohio R.R. Co.* v. *U.S.*,[14] *Mobile Gas Service Corp.* v. *Federal*

[11] Reed v. Allen, 286 U.S. 191, 76 L. Ed. 1054.

[12] State v. Akin Products Co. (Texas Supreme Court Jan. 4, 1956) 25 Tex. Sup. Ct. Reporter 177, affirming 279 S. W. 2d 409.

[13] Crow v. City of Corpus Christi, 146 Tex. 558, 209 S. W. 2d 922, cited in the Supreme Court opinion in the Mobile case, Note 5 supra.

[14] Baltimore and Ohio R.R. Co. v. U.S., 279 U.S. 781.

*Power Commission.*[15] I hold that it is applicable here, and that Natural is entitled to recover the excess payments, except to the extent that countervailing equities make it unjust for it to do so. The remedy of restitution is not a rigid legal right, and in applying it I conceive it to be the court's duty to limit the recovery to the amount which, under the circumstances, in equity and good conscience, should be restored.

> "The claimant to prevail must show that the money was received in such circumstances that the possession will give offense to equity and good conscience if permitted to retain it. . . .
>
> The question no longer is whether the law would put him in possession of the money if the transaction were a new one. The question is whether the law will take it out of his possession after he has been able to collect it. . . .
>
> ". . . 'Restitution is not of mere right. It is *ex gratia* resting in the exercise of a sound discretion . . .'" Cardozo, J., in *Atlantic Coast Line R.R. Co.* v. *State of Florida.*[16]

I hold that there are countervailing equities to the extent of $321,279.00, being $237,000.00 paid by Panoma to its royalty owners as royalty and $84,279.00 paid by it as increased gross production taxes, out of and by reason of the "excess payments" by Natural. These amounts were not retained by Panoma, but were paid out by it, and in my opinion necessarily so. To have withheld payment of royalty on a portion of the amount currently being paid for the gas by Natural would almost certainly have precipitated difficulties with the royalty owners, possibly to the extent of claims for cancellation of leases, avoidance of which inured to Natu-

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[15] Mobile Gas Service Corp. v. Federal Power Com., 215 F. 2d 883, affirmed by the Supreme Court. See Note 5 supra.

[16] Atlantic Coast Line R.R. Co. v. State of Florida, 295 U.S. 301, 79 L. Ed. 1451.

ral's benefit. In making its payments, Natural is bound to have known that Panoma would have to pay out a part of the "excess payments" as royalties and gross production taxes. I believe it to be just and equitable to reduce the recovery allowed Natural in this case below the entire amount sued for, by the sum of $321,279.00.

I cannot, however, follow the suggestion of defendants that I should also take into account some $412,000.00 in royalties and taxes paid out by Panoma prior to August 1, 1952, by reason of the difference between the contract price and the price promulgated by the State Commission in its prior order of December 9, 1946 (the so-called "7-cent" order). Natural made no payments above the contract price prior to August 1, 1952, nor by reason of the 7-cent order, and the amounts so paid out by Panoma have no connection with the restitution sued for.

As to the matter of interest, I have concluded that it is just and equitable, under the circumstances of this case, to deny plaintiff's claim for interest. In so concluding, I have taken into account all the facts and circumstances before me, including the fact that Natural could have superseded the operation of the order as to this gas, and kept the use of the money, by filing a mere undertaking without surety or penal amount (as did Northern Natural Gas Company); that it was willing to waive interest if Panoma would agree to the escrowing of the excess payments; and that for most of the period in question it has been able to recoup the excess payments by increased rates to its customers, so that it has not in fact been deprived of the use of the money.

I therefore hold that Natural is entitled to recover from the defendants the sum of $1,302,491.23, with interest only

from the date of the judgment. In view of the defendants' letter agreement of July 1, 1954, I hold further that this recovery shall be from the defendants jointly and severally.

Counsel for plaintiff may submit a form of judgment, for consideration after notice to counsel for defendants.

DONE at Dallas, Texas, this 9th day of March 1956.

JOE E. ESTES
*United States District Judge*

## CERTIFICATE OF SERVICE

I certify that on February. , 1958, I deposited in a United States mail box, with first class air mail postage prepaid, copies of the foregoing petition, addressed respectively to counsel of record for Respondents, at their post office addresses, that is:

To Messrs. DAVID T. SEARLS
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To Mr. HUGH L. UMPHRES
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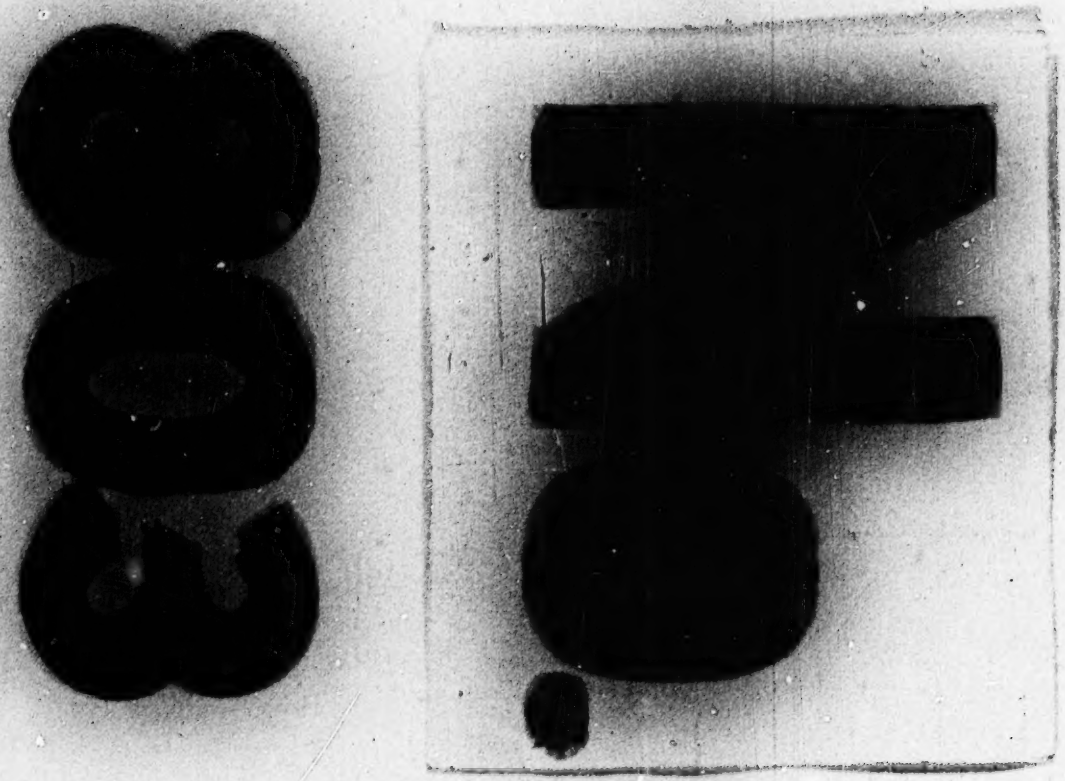
*Counsel of Record for Petitioner*



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JOHN T. FEY, Clerk

NO. 803

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957

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NATURAL GAS PIPELINE COMPANY OF AMERICA, *Petitioner*

vs.

D. D. HARRINGTON, ET AL., *Respondents*

---

## REPLY TO BRIEF IN OPPOSITION TO (STYLED "REPLY TO") PETITION FOR CERTIORARI

---

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*Counsel for Petitioner*

Dated: March 28, 1958

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957

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NO. 803

NATURAL GAS PIPELINE COMPANY OF AMERICA, *Petitioner*

vs.

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---

## REPLY TO BRIEF IN OPPOSITION TO (STYLED "REPLY TO") PETITION FOR CERTIORARI

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The petition for certiorari herein has the following background: the suit below was for restitution of sums paid for gas, in excess of the contract price, under the duress of a void * order of the Corporation Commission of Oklahoma; the court below (246 F. 2d 915) granted restitution and interest after April 11, 1955, when the order was declared void; it refused interest on the monthly payments prior to that date; the petition complains of such denial of interest, amounting to some $148,000. The petition's rationale pro-

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* The order was held void in *Natural Gas Pipeline Company of America* v. *Panoma Corporation*, 349 U.S. 44. Its invalidity was intensified by the memorandum decision of the court in *Michigan Wisconsin Pipeline Company* v. *Corporation Commission of Oklahoma* (and companion cases), decided January 27, 1958, 26 L.W. 3219, holding the order void in toto, not merely as to sales to the litigants.

ceeds upon the following basis, deemed sufficient to attract the consideration of this Court:

1. Such denial of interest is contrary to the decisions of this Court in *Arkadelphia Milling Co.* v. *St. Louis S. W. Ry. Co.*, 249 U.S. 134, 147 and *Baltimore & Ohio Railroad Co.* v. *United States*, 279 U.S. 781, 786.

2. Such denial of interest is in principle wrong, because the beneficiary of the void order is left unjustly enriched by the use of the money, the value thereof a large sum, and the plaintiff deprived of such use.

3. The ruling is violative of the policy of the Natural Gas Act, which allows interest when excessive rates are collected.

4. The consideration of this Court is properly invoked because of the importance of preserving the principles of restitution, a vital procedure in alleviating administrative or judicial error, which has wide application, and is currently important in problems concerning restitution arising under the Natural Gas Act. (*United Gas Pipeline Company* v. *Mobile Gas Service Corp.*, 350 U.S. 332.)

Contra, the Brief in Opposition quotes from *Atlantic Coast Line Company* v. *State of Florida*, 295 U.S. 301, to effect that restitution is subject to equitable circumstances, and urges that for that reason the court below has plenary power to deny restitution or condition it by refusing interest. To this we answer:

(a) The *Atlantic Coast Line*, case, itself a five to four decision, because of the five to four decision in *Chicago, Milwaukee, St. Paul & Pacific R. R. Co.* v. *State of Illinois*, decided March 17, 1958, 26 L.W. 3266, has become a frail reed to lean upon, if not expressly overruled. In the latter case, it was held that a fund, impounded upon an appeal from an order of the Interstate Commerce Commission

found defective, should not await reprocessing of the order, likely to sustain its conclusion, but should be distributed at once to the public.

(b) There is nothing in the background facts of the *Atlantic Coast Line* case which justifies its application here. There the administrative order was defective only in form, not in substance, and had been corrected. Here the order was totally void.

(c) The fact that restitution may be equitable in nature does not grant an unrestrained discretion to refuse interest. The discretion to the extent it may exist, must be a sound, judicial discretion; such discretion is controlled by and must adjust to the two decisions of this Court above referred to, awarding interest in like situation.

(d) The equitable circumstances that are said to justify the denial of interest are inherently without merit. They are:

(i) The Petitioner might have superseded. Obviously, there can be no restitution, nor interest on restitution, if the claimant was obliged to supersede.* Petitioner did not supersede, in order to place on its customers the risk, as well as the benefits, of the litigation. See discussion of court below (P.C. 17) as to business duress.

(ii) That Natural has been able to recover the excess payments by increased rates to its customers so that it has not been deprived of the use of the money. With a voice weary from repeated effort in the courts below, we here repeat: Natural was unable to pass on to its customers the illegal exactions until April 1, 1953

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* Natural once offered to place the money in escrow (T-53) but Harrington refused (T-54). If so placed, there would be earnings to follow the fund. Harrington chose to take and retain the money, and had benefit of its use.

(T-66); it is required to repay to its customers the interest recovered herein from that date on (T-66–68). It is not an equitable circumstance moving against petitioner, that it is here asserting the rights of the public that it serves.

(iii) That respondents were required to pay increased royalties and production taxes "on the basis of the payments made by Natural," under the minimum price law. The contention is fundamentally wrong, because restitution does not and cannot consider the effect on relations of defendant to third persons.* It is also not true that respondents were required to pay these charges because we made payment under protest. (See the discussion of the court below, P.C. 18,19.) In any event, the contention goes to the propriety of credits for the sums so paid, which the court below denied, not to whether interest should be allowed or denied.

(e) It is to be observed that the respondents do not here rely on the rationale of the court below (P.C. 19–20) upon which interest was excused: that respondents had no duty to repay until the order was found void (citing an ancient Pennsylvania case). They presumably do not regard it as sound.

(f) The brief cites *Jackson County* v. *United States*, 308 U.S. 343, as justifying a denial of interest. That cause was primarily concerned with construction of a Federal statute authorizing cancellation of patents on restricted Indian land; the ruling was that interest could not be recovered on taxes paid, in a very special situation where the collection of the taxes, made in good faith, was occasioned by the acts of a Federal agency. It cannot remotely apply where

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* *Southern Pacific Company* v. *Darnell-Taenzer Lumber Company*, 245 U.S. 531, 533; *Central States Electric Co.* v. *Muscatine*, 324 U.S. 138, 145; *Ward* v. *Love County*, 253 U.S. 17, 24.

the recipient of the funds received them under notice and protest.

We renew the prayer of the petition.

Respectfully submitted,

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*Counsel for Petitioner*

## CERTIFICATE OF SERVICE

I certify that on March , 1958, I deposited in a United States mail box, with first class air mail postage prepaid, copies of the foregoing Reply Brief, addressed respectively to counsel of record for Respondents, at their post office addresses, that is:

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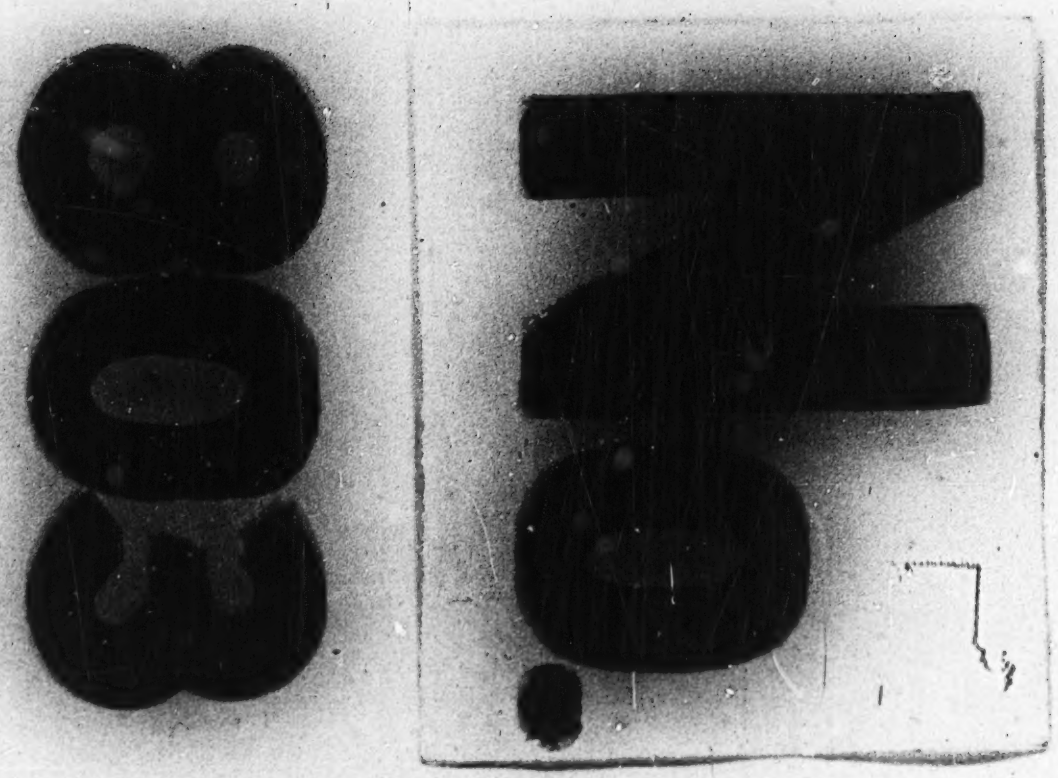

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No. 803

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# Supreme Court of the United States

OCTOBER TERM, 1957

NATURAL GAS PIPELINE COMPANY OF AMERICA,
*Petitioner,*

v.

D. D. HARRINGTON, ET AL,
*Respondents.*

## REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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# INDEX


| | PAGE |
|---|---|
| Questions Presented by the Reply | 1 |
| Statement of the Case | 2 |
| Reasons for Denying the Writ | 4 |
| Conclusion | 8 |
| Proof of Service | 9 |


## AUTHORITIES

### Cases


| | |
|---|---|
| Atlantic Coastline R.R. Co. v. State of Florida, 295 U.S. 301 (1935) | 2, 4 |
| Cities Service Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 175 (1950) | 2 |
| Jackson County v. United States, 308 U.S. 343 (1940) | 6 |
| Natural Gas Pipeline Co. of America v. Corporation Commission of Oklahoma, 272 P. 2d 425 (April 27, 1954) | 3 |
| Natural Gas Pipeline Company of America v. Panoma Corp., 349 U.S. 44 (1955) | 8 |
| Phillips Petroleum Co. v. Wisconsin, et al, 347 U.S. 672 (June 7, 1954) | 3 |


### Other Authorities


| | |
|---|---|
| Restatement of Restitution, Section 156(b) | 8 |

No. 803

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# Supreme Court of the United States

OCTOBER TERM, 1957

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D. D. HARRINGTON, ET AL,
*Respondents.*

---

## REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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*To The Honorable Supreme Court of the United States:*

Now come D. D. Harrington, et al ("Respondents"), and file this their reply to the Petition for Writ of Certiorari previously submitted by Natural Gas Pipeline Company of America. For the purpose of brevity, the Petitioner will be referred to as "Natural."

## QUESTIONS PRESENTED BY THE REPLY

1. Whether Petitioner's claim for additional interest is foreclosed by the fundamental principles underlying the equitable remedy of restitution established by this Court

in *Atlantic Coastline R. R. Co.* v. *State of Florida*, 295 U.S. 301, which permit a Court in Equity, in the exercise of its discretion, to award or deny interest according to the justice of the case.

2. Whether Respondents' liability to make restitution includes a duty to pay interest on the award for a period prior to the time they breached their duty to make restitution.

## STATEMENT OF THE CASE

Respondents entered into a gas purchase contract with Natural effective December 1, 1946, whereby Respondents agreed to deliver a stated quantity of gas to be produced from certain described gas reserves in the Guymon-Hugoton Field in Oklahoma, and Natural agreed to pay for each 1,000 cubic feet of gas delivered, a base price of 6¢ until July 1, 1951, and for the five years thereafter, 7¢ (T. 42-47). On December 9, 1946, the Oklahoma Corporation Commission fixed a minimum price of 7¢ for all gas removed from the Guymon-Hugoton Field (Order 19514) (T. 22, 23). Natural superseded this order by posting bond and made no payment thereunder (T. 23, 24). The validity of this minimum price order was upheld by this Court in *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U.S. 175 (1950).

A second minimum price order (No. 26096) fixing a minimum price of 9.8262¢, was issued by the Oklahoma Corporation Commission on July 29, 1952 (T. 48, 49). Natural did not avail itself of the opportunity to file a supersedeas bond without surety, but notified Respondents that it would pay the minimum price and that all payments in excess of the contract price were being made under protest (T. 8-10, 25). Natural commenced to pay in accordance with the minimum price order but initiated an appeal therefrom. In

*Natural Gas Pipeline Co. of America* v. *Corporation Commission of Oklahoma*, 272 P. 2d 425 (April 27, 1954), the Supreme Court of Oklahoma upheld the order but upon appeal to this Court the order was held invalid, 349 U.S. 44 (April 11, 1955), as a result of the decision in *Phillips Petroleum Co.* v. *Wisconsin, et al*, 347 U.S. 672 (June 7, 1954).

Natural brought suit to recover by way of restitution, the difference, for the period from August, 1952, to June, 1954, inclusive, between the amount actually paid by it for gas delivered by Respondents referrable to the contract of December 1, 1946, and the amount which would have been paid on the basis of the prices fixed by the contract, with interest at 6% (T. 1). The aggregate contract price for the entire period was $2,827,656.48, and the aggregate amount paid under the order was $4,451,426.71, a difference of $1,623,770.23. On March 22, 1956, the Honorable Joe E. Estes, United States District Judge for the Northern District of Texas, entered summary judgment in favor of Natural against the Respondents for the sum of $1,302,491.23. This award allowed countervailing equities to the extent of $321,279.00, being $237,000.00 paid by Respondents as increased royalties and $84,279.00 paid as increased gross production taxes under the second order (T. 134, 135). Furthermore, Judge Estes found that it was just and equitable to refuse interest on the amount awarded (T. 134, 135).

On July 9, 1957, the United States Court of Appeals for the Fifth Circuit affirmed the award of the District Court, but disallowed the countervailing equities in the amount of $321,279.00 allowed by the District Court, and rendered judgment in favor of Natural against the Respondents for the sum of $1,623,770.23. The Court of Appeals also reversed the District Court's denial of interest and awarded

Natural interest at 6% per annum from April 11, 1955, on all amounts remaining unpaid down to the date of payment.

Respondents' Petition for Rehearing was overruled by the Court of Appeals on January 9, 1958. Despite the fact that the Court of Appeals had disallowed the countervailing equities allowed Respondents by the District Court and had reversed the District Court's denial of interest, Natural filed its Petition for Writ of Certiorari in this Court on February 24, 1958, complaining that in this equitable action for restitution it was entitled to additional interest, as a matter of law, for the period prior to April 11, 1955.

## REASONS FOR DENYING THE WRIT

Since Respondents intend to file a Petition for Writ of Certiorari concerning the entire judgment rendered below, they hesitate to oppose Natural's Petition for Certiorari on the question of additional interest. However, because Respondents believe that the questions involved in Natural's petition are foreclosed by the decisions of this Court and the fundamental principles underlying the equitable remedy of restitution, they have submitted this brief in opposition to Natural's petition, but do not intend to waive, limit or in any way prejudice their request for a review of the entire judgment.

### I.

The recovery in this case is predicated on the equitable remedy of restitution which is a derivative of the broader action for "money had and received." One of the landmark cases in the law of restitution is *Atlantic Coastline R. R. Co.* v. *State of Florida*, 295 U.S. (1935), where freight charges were collected by a railroad carrier pursuant to an order of the Interstate Commerce Commission after the refusal

of the United States District Court to declare the order void. Later, the decree of the District Court was reversed by the Supreme Court and it held that the order of the Interstate Commerce Commission was invalid. At a subsequent date, some years later, the Interstate Commerce Commission on new findings entered the same order and this time the Supreme Court sustained the order. In the meantime, various shippers petitioned the District Court for restitution to the extent of the difference between the rates that had been paid under the first order which was invalid. They were denied restitution. Mr. Justice Cordoza, writing for the Court, held:

> "Decisions of this court have given recognition to the rules as one of general application that what has been lost to a litigant under the compulsion of a judgment shall be restored thereafter, in the event of a reversal, by the litigants opposed to him, the beneficiaries of the error. *Arkadelphia Mill. Co.* v. *St. Louis S.W.R. Co., supra; Northwestern Fuel Co.* v. *Brock*, 139 U.S. 216, 35 L. Ed. 151, 11 S. Ct. 523; Ex parte Lincoln Gas & E. L. Co., 257 U.S. 6, 66 L. Ed. 101, 42 S. Ct. 2; cf. *Haebler* v. *Myers*, 132 N.Y. 363. 30 N.E. 936, 15 L.R.A. 588, 28 Am. St. Rep. 589. Indeed, the concept of compulsion has been extended to cases where the error of the decree was one of inaction rather than action, as where a court has failed to set aside the order of a commission or other administrative body, the constraint of the order being imputed in such circumstances to the refusal of the court to supply a corrective remedy. *Baltimore & O. R. Co.* v. *United States*, 279 U.S. 781, 73 L. Ed. 954, 49 S. Ct. 492, *supra*. But the rule, even though general in its application, is not without exceptions. A cause of action for restitution is a type of the broader cause of action for money had and received, a remedy which is equitable in origin and function. (Citing cases.) The claimant to prevail must show that the money was received in such circumstances

that the possessor will give offense to equity and good conscience if permitted to retain it. (Citing cases.) *The question no longer is whether the law would put him in possession of the money if the transaction were a new one. The question is whether the law will take it out of his possession after he has been able to collect it.*

* * * * *

"Suits for restitution upon the reversal of a judgment have been subjected to the empire of that principle like suits for restitution generally. '*Restitution is not of mere right. It is ex gratia resting in the exercise of a sound discretion, and the court will not order it where the justice of the case does not call for it, nor where the process is set aside for a mere slip.*' (Citing cases.) 'In such cases the simple but comprehensive question is *whether the circumstances are such that equitably the defendant should restore to the plaintiff what he has received.*'" (Emphasis supplied.)

Thus, the touchstone of the equitable remedy of restitution is the discretion of a court in equity to render its judgment according to the justice of the case. The application of this fundamental principle of restitution to the question of interest was clearly stated by Mr. Justice Frankfurter in *Jackson County* v. *United States*, 308 U.S. 343 (1940):

"Assuming, however, that the laws as to interest in government actions based upon quasi-contractual obligations be applicable, the United States must fail here. *The cases teach that interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness. It is denied when its exaction would be unequitable.* *United States* v. *Sanborn*, 135 U.S. 271, 281, 34 L. Ed. 112, 115, 10 S. Ct. 812; *Billings* v. *United States*, 232 U.S. 261, 58 L. Ed. 596, 34 S. Ct. 421." (Emphasis supplied.)

Here, the record is clear that Natural did not have to make any payments pursuant to the Oklahoma minimum price law. It could have superseded the operation of the order and kept the use of the money by filing a mere corporate undertaking without surety or penal amount as did Northern Natural Gas Company (T. 135). Another factor which cannot be overlooked is that during most of the period in question, Natural has been able to recoup the excess payments it made by increased rates to its customers, so that it has not in fact been deprived of the use of the money (T. 135). Additionally, Respondents were required to pay an aggregate of $321,279 in increased royalties and production taxes on the basis of the payments made by Natural under the second Oklahoma minimum price law in order to protect and preserve the leaseholds dedicated under the contract with Natural (T. 125, 134). Such payments inured to Natural's benefit and the trial court held that equity prevented restitution of this sum (T. 134). The Court below possessed the power to mold its decree in light of all the surrounding facts and circumstances, particularly in an action for restitution where the Court's judgment is purely discretionary, and the factors enumerated above form substantial support for the Court's discretionary refusal to award Natural the additional interest sought herein.

## II.

Although restitution is an equitable remedy and governed by equitable principles, Natural has sought to impose a rigid legal formula in regard to the granting of interest on any amounts awarded as restitution. However, even if it is assumed that interest follows an award in an action for restitution, as a matter of law, Natural is not entitled to recover the additional interest sought herein because

Respondents were under no duty to pay interest until they committed a breach of duty in failing to make restitution, i.e., April 11, 1955, when this Court determined that the Oklahoma minimum price law was invalid in *Natural Gas Pipeline Company of America* v. *Panoma Corp.*, 349 U.S. 44 (1955). See Restatement of Restitution, Section 156(b).

## CONCLUSION

There is no basis for Natural's claim to additional interest. This Court has decided that restitution is a matter of discretion which should be exercised according to the justice of the case. *Atlantic Coastline R.R. Co.* v. *State of Florida, supra; Jackson County* v. *United States, supra.* And when there is a substantial basis supporting the exercise of this discretion, it should not be overtuned. In any event, Respondents were not under a duty to pay interest prior to the time their obligation to make restitution arose.

For these reasons, it is submitted that Natural's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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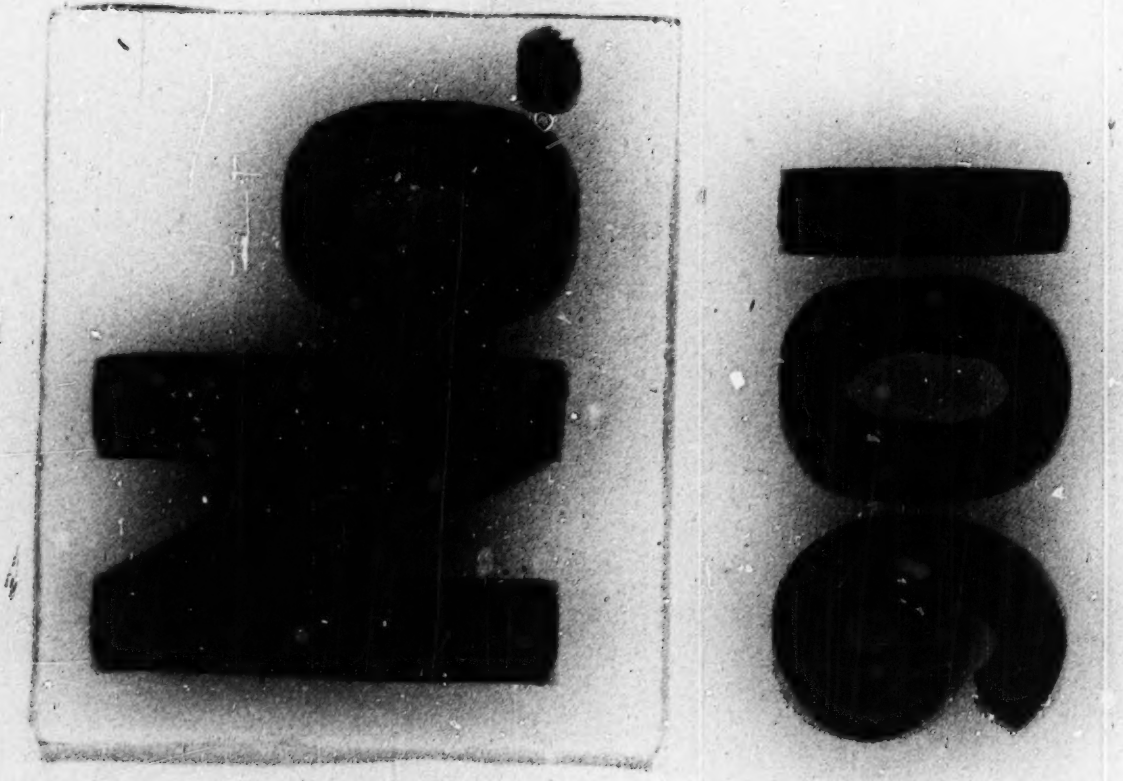
## PROOF OF SERVICE

I, DAVID T. SEARLS, one of the attorneys for Respondents herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of March, 1958, I served copies of the foregoing Reply to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, on Petitioner, Natural Gas Pipeline Company of America.

.....

DAVID T. SEARLS



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IN THE

# Supreme Court of the United States

October Term, 1957.

No. ....901

D. D. HARRINGTON, ET AL,

*Petitioners,*

v.

NATURAL GAS PIPELINE COMPANY OF AMERICA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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# SUBJECT INDEX


| | | Page |
|---|---|---|
| Opinions Below | | 2 |
| Jurisdiction | | 2 |
| Questions Presented | | 2 |
| Statute Involved | | 3 |
| Statement of the Case | | 3 |
| Reasons for Granting the Writ | | 6 |
| Point I. | The Court of Appeals Erroneously Interpreted the Panoma Case and Rendered a Decision Inconsistent With Other Decisions of this Court | 7 |
| | 1. The Court Below Has Misread the Panoma Decision and Extended It Far Beyond Its Scope | 7 |
| | 2. The Decision of the Court of Appeals Is Inconsistent with the Decisions of this Court Which Sustain the Validity of State Regulatory Action "Where Federal Power Has Been Delegated But Lies Dormant and Unexercised" | 9 |
| Point II. | The Decision Rendered By the Court Below Completely Disregards the Existence of the Oklahoma Minimum Price Laws and Erroneously Subjects the Equitable Remedy of Restitution to a Rigid Legal Formula | 12 |
| | 1. Even If Unconstitutional, the Oklahoma Minimum Price Laws Were Not Without Operative Effect | 12 |
| | 2. The Established Law of Restitution | 14 |
| Point III. | The Decision Rendered Below Determines the Rate to Be Charged for Gas Sold and Delivered by Petitioners to Natural From August 1, 1952, to July 1, 1954, and Thereby Invades the Plenary Jurisdiction of the Federal Power Commission, and Violates the Filed Rate Procedure Established by the Natural Gas Act | 16 |
| | 1. The Filed Rate Is the Only Legally Enforceable Rate | 16 |

PAGE

2. No Filed Rate — No Enforceable Rate — No Judicial Rate ..... 17

Point IV. The Existence of Material Issues of Fact and the Necessity for Inquiry Into the Surrounding Facts and Circumstances in Order That the Equitable Discretion of the Court Could Be Properly Exercised Precluded the Rendition of a Summary Judgment ..... 18

1. Summary Judgment Was Premature ..... 18

Conclusion ..... 20

Appendix "A" — Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit, rendered July 9, 1957 ..... 21

Appendix "B" — *Per Curiam* Opinion of the United States Court of Appeals for the Fifth Circuit, rendered March 5, 1958 ..... 35

Appendix "C" — Opinion of the United States District Court for the Northern Division of Texas 37

Appendix "D" — Pertinent Provisions (Sections 4, 5 and 16) of the Natural Gas Act of 1938 ..... 60

## INDEX OF AUTHORITIES

Atlantic Coastline R. Co. v. Florida, 295 U.S. 301 (1935)..... 15, 18

Chicot Co. Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940) ..... 12

Cities Service Gas Co. v. Kansas, ..... U.S. ..... (Decided on January 28, 1958) ..... 7

Cities Serv. G. Co. v. Peerless O. & G. Co., 340 U.S. 179 (1950) ..... 2, 4, 6

Federal Power Com. v. Hope Nat. Gas Co., 320 U.S. 591 (1944) ..... 11, 16

Guss v. Utah L. R. B., 353 U.S. 1 (1957)..... 10

H. P. Welch Co. v. New Hampshire, 306 U.S. 79 (1939) ..... 9, 10

Harriman v. Northern Securities Co., 197 U.S. 244 (1905) .... 18

Missouri P. R. Co. v. Larabee Flour Mills Co., 211 U.S. 612 (1909) ..... 9, 10

Montana-Dakota Util. Co. v. Northwestern P. S. C., 341 U.S. 246 (1950) ..... 17

| | Page |
|---|---|
| Natural Gas Pipeline Co. v. Panoma Corp., 349 U.S. 44 (1955) | 3, 6 |
| Natural Gas Pipeline Co. v. Corporation Commission, 272 P. 2d 425 (April 27, 1954) | 4 |
| Northwestern B. T. Co. v. Nebraska State R. Co., 297 U.S. 471 (1936) | 9 |
| Panhandle E. Pipeline Co. v. Public Serv. Com., 332 U.S. 507 (1947) | 11 |
| Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954) | 6 |
| Public Utilities Com. v. United Fuel Gas Co., 317 U.S. 456 (1943) | 11 |
| Second Russian Ins. Co. v. Miller, 268 U.S. 552 (1925) | 17 |
| Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945) | 9 |
| Terminal R. Asso. v. Brotherhood of Trainmen, 318 U.S. 1 (1943) | 9 |


## Statutes Cited


| | |
|---|---|
| 28 U.S.C.A., Section 1254(1) | 2 |
| Natural Gas Act, 15 U.S.C.A., Sections 717-717w | 3 |


## Administrative Orders


| | |
|---|---|
| Federal Power Commission Series 174 Orders: | |
| Order No. 174, issued July 16, 1954 | 2 |
| Order No. 174-A, issued August 6, 1954, and Order No. 174-B, issued December 17, 1954 | 2 |

IN THE

# Supreme Court of the United States

October Term, 1957.

No. .....

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D. D. HARRINGTON, ET AL,

*Petitioners,*

v.

NATURAL GAS PIPELINE COMPANY OF AMERICA,

*Respondent.*

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

D. D. Harrington, et al ("Petitioners") pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled cause on July 9, 1957, together with the *per curiam* opinion of that court dated March 5, 1958, denying Petitioners leave to file a second petition for rehearing.

The Respondent, Natural Gas Pipeline Company of America ("Natural"), filed a petition for writ of certiorari in this Court on February 24, 1958, which is limited to its claim for additional interest on the amount of restitution awarded by the court below. Petitioners filed a brief in opposition to Natural's petition, and notified the Court that they would file this petition for writ of certiorari requesting review of the entire judgment rendered by the court below.

## OPINIONS BELOW

The original opinion and judgment of the Court of Appeals for the Fifth Circuit of July 9, 1957, is reported in 246 F. 2d 915, and is printed as Appendix "A" hereto, *infra* pp. 21-34. The *per curiam* opinion of the Court of Appeals, rendered March 5, 1958 (not yet reported), is printed as Appendix "B" hereto, *infra* pp. 35-36. The opinion and judgment of the District Court is reported in 139 F. Supp. 452, and is printed as Appendix "C" hereto, *infra* pp. 37-59.

## JURISDICTION

The judgment of the Court of Appeals was entered on July 9, 1957. A petition for rehearing was filed by Petitioners on July 29, 1957, and was overruled on January 9, 1958. Petitioners' application for leave to file a second petition for rehearing was overruled by a *per curiam* opinion of the Court of Appeals dated March 5, 1958. Jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

## QUESTIONS PRESENTED

1. Whether state minimum price laws constituted a valid exercise of state regulatory power over matters of local concern *prior* to the time that the paramount federal authority was implemented by the Federal Power Commission in its Series 174 orders[1] issued during the summer and fall of 1954.

2. Whether in a suit for restitution of sums paid pursuant to the Oklahoma minimum price laws (legislation upheld by this Court in the *Peerless* case[2] but subsequently

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[1] Order No. 174 was issued July 16, 1954; Order No. 174-A was issued August 6, 1954, and Order No. 174-B was issued December 17, 1954.

[2] *Cities Serv. Gas Co.* v. *Peerless O. & G. Co.*, 340 U.S. 175 (1950).

declared invalid in the *Panoma* case[3]) recovery is a matter of right to be awarded on summary judgment and to be measured by a rigid legal formula without regard for the discretion of a court in equity to mold its decree according to the justice of the case.

3. Whether the determination by the court below of the rate to be charged for gas sold to Natural from August 1, 1952, to July 1, 1954, invades the plenary jurisdiction of the Federal Power Commission and violates the filed rate procedure established by the Natural Gas Act.[4]

4. Whether the existence of material issues of fact and the necessity for inquiry into the surrounding facts and circumstances in order that the equitable discretion of the court could be properly exercised precluded the rendition of a summary judgment.

## STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821, 15 U.S.C. 717 et seq., are set out in Appendix "D", *infra*, pp. 60-64.

## STATEMENT OF THE CASE

Petitioners entered into a gas purchase contract with Natural effective December 1, 1946, whereby Petitioners agreed to deliver a stated quantity of gas to be produced from certain described gas reserves in the Guymon-Hugoton Field in Oklahoma, and Natural agreed to pay for each 1,000 cubic feet of gas delivered, a base price of 6¢ until July 1, 1951, and for the five years thereafter, 7¢ (R. 42-47). On December 9, 1946, the Oklahoma Corporation Commis-

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[3] *Natural Gas Pipeline Co.* v. *Panoma Corp.*, 349 U.S. 44, April 11, 1955.

[4] Natural Gas Act, 15 U.S.C.A. Sections 717-717w.

sion fixed a minimum price of 7¢ for all gas removed from the Guymon-Hugoton Field (Order 19514) (R. 22, 23). Natural superseded this order by posting bond and made no payment thereunder (R. 23, 24). The validity of this minimum price order was upheld by this Court in *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U.S. 175, (1950).

A second minimum price order (No. 26096) fixing a minimum price of 9.8262¢, was issued by the Oklahoma Corporation Commission on July 29, 1952 (R. 48-49). Natural did not avail itself of the opportunity to file a supersedeas bond without surety, but notified Petitioners that it would pay the minimum price and that all payments in excess of the contract price were being made under protest (R. 8-10, 25). Natural commenced to pay in accordance with the minimum price order but initiated an appeal therefrom. In *Natural Gas Pipeline Co.* v. *Corporation Commission*, 272 P. 2d 425 (April 27, 1954), the Supreme Court of Oklahoma upheld the order but upon appeal to the United States Supreme Court the order was held invalid, 349 U.S. 44, (April 11, 1955).

Pending appeal, as a result of the payments by Natural Petitioners paid the royalty owners and the Oklahoma production tax on the basis of the 9.8262¢ which was being received by it from Natural. From August 1, 1952, to July 1, 1954, extra royalty amounting to $237,000.00 and extra Oklahoma production taxes amounting to $84,279.00, an aggregate of $321,279.00, was paid by Petitioners (R. 25, 134). In addition, Petitioners had paid extra royalty and production taxes under the first minimum price order in the aggregate amount of $412,000.00 although Natural had not made any payments in accordance with such order (R. 23, 134). It is undisputed that these increased royalty and tax payments were necessary to continue in force the leasehold interests which contained the gas reserves dedi-

cated under the gas purchase contract with Natural (T. 23, 134).

Natural brought suit to recover by way of restitution the difference, for the period from August, 1952, to June, 1954, inclusive, between the amount actually paid by it for gas delivered by Petitioners referrable to the contract of December 1, 1946, and the amount which would have been paid on the basis of the prices fixed by the contract, with interest at 6% (R.1). Federal jurisdiction was based upon diversity of citizenship of the parties (R. 1). The aggregate contract price for the entire period was $2,827,656.48, and the aggregate amount paid under the order was $4,451,426.71, a difference of $1,623,770.23. On March 22, 1956, the Honorable Joe E. Estes, United States District Judge for the Northern District of Texas, entered summary judgment in favor of Natural against the Petitioners for the sum of $1,302,491.23, but in the exercise of his equitable discretion allowed Petitioners countervailing equities to the extent of $321,279.00, being $237,000.00 paid by Petitioners as increased royalties and $84,279.00 paid as increased gross production taxes under the second order (R. 134, 135). Furthermore, Judge Estes found that it was just and equitable to refuse interest on the amount awarded (R. 134, 135).

On July 9, 1957, the United States Court of Appeals for the Fifth Circuit affirmed the award of the District Court, but disallowed the countervailing equities in the amount of $321,279.00 allowed by the District Court, and rendered judgment in favor of Natural against the Petitioners for the full sum of $1,623,770.23 (App. 30-31). The Court of Appeals also reversed the District Court's denial of interest and awarded Natural interest at 6% per annum from April 11, 1955, on all amounts remaining unpaid down to the date of payment (App. 31).

Petitioners' original petition for rehearing was overruled on January 9, 1958 (R. 229). Thereafter, on March 5, 1958, by a *per curiam* opinion, the Court of Appeals denied Petitioners leave to file a second petition for rehearing because the court considered that the question of whether the Oklahoma minimum price laws were valid prior to the exercise of federal authority had been decided by this Court in *Natural Gas Pipeline Co. v. Panoma Corp.*, 349 U.S. 44 (Supp. R. 23, App. 35).

## REASONS FOR GRANTING THE WRIT

This request for review presents for the first time, important federal questions which are of vital concern to the many producers of natural gas in Oklahoma and Kansas who received payments in excess of their contract prices pursuant to the minimum price laws promulgated by the regulatory agencies of those states. Such payments were received with the assurance of this Court in *Ohio Fuel Gas Co. v. Peerless O. & G. Co.*, 340 U.S. 175 (1950), that minimum price laws were a proper exercise of state regulatory power. Accordingly, in order to protect the gas reserves dedicated under their contracts, these producers paid royalties and production taxes on the basis of the increased payments. Subsequently, pursuant to the mandate contained in the *Phillips* case,[3] the Federal Power Commission implemented its jurisdiction over rates for natural gas by the issuance of its Order No. 174 on July 16, 1954. Thereafter, in *Natural Gas Pipeline Co. v. Panoma Corp.*, 349 U.S. 44 (April 11, 1955), it was determined that the Oklahoma minimum price law conflicted with this administrative implementation of the paramount federal authority and therefore was invalid. However, in the *Panoma* case this Court did not seek to determine whether such state

[3] *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954).

minimum price law was valid or invalid prior to the time that the federal authority was exercised.

Now this Court is confronted with the issue of whether, in an equitable action for restitution, Petitioners are obligated to refund all or any part of the amounts in excess of their contract price collected from August, 1953, to June, 1954, inclusive. Before Petitioners are liable to refund all or any part of such increased amounts, it must first be determined that state minimum price laws were invalid during the period prior to the regulation of rates of independent producers by the Federal Power Commission, i.e. prior to July 16, 1954, when the federal jurisdiction was first implemented by Order No. 174. In turn, the answer to this question is dependent upon a determination of whether Congress intended to preclude such state action by the mere enactment of the Natural Gas Act, and thereby create a hiatus until the Commission acted, or whether the existing state power was to remain unimpaired until the Commission implemented its jurisdiction. These are important federal questions with industry-wide consequences, which urgently call for determination by this Court for the first time. The recent decision by this Court in *Cities Service Gas Co. v. Kansas* (decided on January 23, 1956), holding the Kansas minimum price law invalid, compounds the financial and legal impact of this case and reinforces the necessity for review.

## POINT I.

### The Court of Appeals Erroneously Interpreted the Panoma Case and Rendered a Decision Inconsistent With Other Decisions of This Court.

#### 1. *The Court Below Has Misread the Panoma Decision and Extended It Far Beyond Its Scope.*

In determining that Natural was entitled to restitution of all amounts ($1,623,770.23) in excess of the contract price paid to Petitioners pursuant to the second Oklahoma minimum price law for August, 1952, to June, 1954, inclusive, the Court of Appeals assumed that the mere enactment of the Natural Gas Act in 1938 prevented the State of Oklahoma from subsequently regulating the minimum price for gas taken from the Guymon-Hugoton Field despite the fact that the federal authority lay "dormant and unexercised." Inherent in this assumption is a limitation upon the power of a state to enter an order concededly necessary in the interest of conservation, prevention of waste and protection of correlative rights in a natural gas reservoir, even though the Federal Power Commission had made no attempt to regulate these matters. The court below based its assumption upon the decision of this Court in *Panoma*, and erroneously relied upon that decision as determining that the Oklahoma minimum price laws were invalid from their inception (Supp. R. 23-24). This was an unwarranted expansion of the *Panoma* case.

In *Panoma*, this Court determined that the Oklahoma minimum price law conflicted with the paramount federal jurisdiction over rates for natural gas which had been implemented by the Series 174 orders issued by the Federal Power Commission, but did not seek to determine the retroactive invalidity of the Oklahoma minimum price law, and, indeed, that issue was not before the Court for decision, and was not urged in the argument or briefs presented to the Court. It was mentioned by Justice Douglas in his dissent, but there is nothing in the briefs or record to show that this point was passed upon by the Court. It was not a point material to the decision in that case and would have been *obiter dictum*. The sole question was whether the Oklahoma minimum price law could continue to stand in

the face of the regulations promulgated by the Federal Power Commission. This Court expressly stated that the result reached was controlled by the *Phillips* case in which the validity of prior state regulation was not discussed. An examination of the *Panoma* and *Phillips* cases shows that they are readily distinguishable on the facts and issues presented and are not determinative of this proceeding.

The composite effect of the *Panoma* decision was to vitiate the Oklahoma minimum price law, because federal jurisdiction had been implemented by the Series 174 orders promulgated by the Federal Power Commission during the summer and fall of 1954, and thus, *at that time*, the theretofore valid state regulations were superseded. It is, therefore, clear that the court below misread *Panoma* when it ruled that this Court had determined that the Oklahoma minimum price law was invalid prior to the time the Commission implemented its jurisdiction.

2. ***The Decision of the Court of Appeals Is Inconsistent with the Decisions of this Court Which Sustain the Validity of State Regulatory Action "Where Federal Power Has Been Delegated But Lies Dormant and Unexercised."***

The assumption by the court below that the mere existence of the Natural Gas Act made the Oklahoma minimum price orders void *ab initio*, disregards and ignores the decisions of this Court which firmly establish that merely because Congress has vested regulatory power in a federal agency, that does not of itself displace state regulation if no federal standards are set. *H. P. Welch Co.* v. *New Hampshire*, 306 U.S. 79 (1939); *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 (1945); *Terminal R. Asso.* v. *Brotherhood of Trainmen*, 318 U.S. 1 (1943); *Northwestern B. T. Co.* v. *Nebraska State R. Co.*, 297 U.S. 471 (1936); *Missouri P. R.*

*Co.* v. *Larabee Flour Mills Co.*, 211 U.S. 612 (1909). This fundamental principle underlying the demarcation between federal and state authority was cogently summarized in *Missouri P. R. Co.* v. *Larabee Flour Mills Co., supra,* where the Court stated:

> "In other words, the mere grant by Congress to the Commission of certain national powers in respect to interstate commerce does not of itself, and in the absence of action by the Commission, interfere with the authority of the state to make those regulations conducive to the welfare and convenience of its citizens."

In each case, the effect of federal legislation on state regulation is a matter of congressional intent as derived from the statute itself, its primary purpose and the judicial construction that has been placed thereon. *Guss* v. *Utah L.R.B.*, 353 U.S. 1 (1957). In the *Guss* case this Court was confronted with a problem very similar to the one which is presented here, and in determining that Congress preempted the field by merely enacting the National Labor Relations Act, the Court made the following statement:

> "Our reading of Section 10(a) forecloses the argument based upon such cases as *H. P. Welch Co.* v. *New Hampshire*, 306 U. S. 79, 83 L. Ed. 500, 59 S. Ct. 438, and *Missouri P. R. Co.* v. *Larabee Flour Mills Co.*, 211 U.S. 612, 53 L. Ed. 352, 29 S. Ct. 214, that 'where federal power has been delegated but lies dormant and unexercised,' *Bethlehem Steel Co.* v. *New York State Labor Relations Board, supra,* (330 U.S. at 775), the states' power to act with respect to matters of local concern is not necessarily superseded. *But in each case the question is one of congressional intent.* Compare *H. P. Welch Co.* v. *New Hampshire* (U.S.), *supra,* with *Napier* v. *Atlantic Coastline R. Co.*, 272 U.S. 604, 71 L. Ed. 432, 47 S. Ct. 207." (Emphasis supplied.)

Therefore, the crucial question in this proceeding, and one which the court below failed to determine because of its erroneous interpretation of the *Panoma* case, is whether, by the enactment of the Natural Gas Act, Congress intended to curtail state power prior to the implementation of the paramount federal authority provided therein.

Section 16[6] of the Natural Gas Act grants the Federal Power Commission the power to issue, make, amend and rescind such orders, rules and regulations as it may find necessary or appropriate to carry out the provisions of the Act, and further specifically provides that:

> "Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe."

As evidenced by many decisions of this Court, the fundamental congressional purpose underlying the Natural Gas Act was to complement and supplement, insofar as possible, the existing state jurisdiction over matters of local concern. *Public Power Com.* v. *United Fuel Gas Co.*, 317 U.S. 456 (1943); *Federal Power Com.* v. *Hope Nat. Gas Co.*, 320 U.S. 591 (1944). See also *Panhandle E. Pipeline Co.* v. *Public Serv. Com.*, 332 U.S. 507 (1947). When this underlying purpose is considered in conjunction with Section 16 of the Act, it shows that Congress did not intend to supersede or preclude state regulation over matters of local concern, such as the Oklahoma minimum price laws, until the paramount federal authority over such matters had been exercised by the Commission.

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[6] Section 16 of the Natural Gas Act is printed in full in Appendix "D" hereto, *infra*, pp. 63-64.

The Oklahoma minimum price laws constituted valid state regulations prior to July 16, 1954, when the Commission first implemented its jurisdiction and, therefore, the court below erred in holding that Natural was entitled to restitution of all amounts in excess to the contract price paid to Petitioners from August, 1952, to June 1954, inclusively, pursuant to the second Oklahoma minimum price law. Because this error is based upon an erroneous interpretation of a decision of this Court, involves important federal questions, and has a wide-spread effect, it necessitates corrective action by this Court by writ of certiorari. See 11 Oklahoma Law Review 65.

## POINT II.

### The Decision Rendered By the Court Below Completely Disregards the Existence of the Oklahoma Minimum Price Laws and Erroneously Subjects the Equitable Remedy of Restitution to a Rigid Legal Formula.

1. *Even If Unconstitutional, the Oklahoma Minimum Price Laws Were Not Without Operative Effect.*

Another facet of the assumption by the court below that the Oklahoma minimum price laws were void *ab initio*, is the fact that its decision gives them no effect whatsoever. The decision is predicated on the theory that such state regulation was unconstitutional and therefore had no effect on Natural's right to restitution. In proceeding on this basis, the decision of the court below is in conflict with the opinion of this Court in *Chicot Co. Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371 (1940), wherein Mr. Chief Justice Hughes made the following statement regarding the effect of a statute which has been declared unconstitutional:

"The courts below have proceeded on the theory that the Act of Congress, having been found to be unconstitutional, was not a law; that it was inoperative, conferring no rights and imposing no duties, and hence affording no basis for the challenged decree. *Norton* v. *Shelby County*, 118 U.S. 425, 442, 30 L. Ed. 178, 186, 6 S. Ct. 1121; *Chicago, I&L R. Co.* v. *Hackett*, 228 U.S. 559, 566, 57 L. Ed. 966, 969, 33 S. Ct. 581. It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. *The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justifiably be ignored.* The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects, — with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of the courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified." Emphasis supplied.

Thus, even though unconstitutional, the Oklahoma minimum price laws were an operative fact and it was incumbent upon the court below to consider their effect on the actions taken by Petitioners in reliance on their validity, i.e., the $412,000.00 the Petitioners paid as extra royalty and production taxes as a result of the first minimum price order (R. 23), and the $321,379.00 paid by Petitioners as extra royalties and production taxes under the second Oklahoma minimum price order as a result of Natural's increased payments

(R. 25, 134). The failure of the court below to give the Petitioners any credit for such payments made in reliance on the validity of the Oklahoma minimum price laws violates the doctrine enunciated in the *Chicot Co. Drainage* case. This doctrine is particularly applicable in the present action for restitution since equitable considerations are paramount, and furthermore, because Petitioners made such increased royalty and tax payments not only in reliance upon the statutes themselves but also in reliance on the determination by this Court in *Peerless* that such laws were valid.

The court below erred in failing to recognize that the Oklahoma minimum price laws, even though unconstitutional, were a prime consideration in determining Natural's right to restitution. This error unjustifiably inflicts severe financial hardship on Petitioners, and since such inequity results from a failure of the court below to follow a decision of this Court, it should be corrected by granting this petition for writ of certiorari.

2. *The Established Law of Restitution.*

Assuming *arguendo* that the state minimum price laws were void *ab initio*, the hundreds of producers of natural gas in Oklahoma and Kansas who received payments pursuant to the minimum price laws of those states in excess of their contract price, could hardly have been expected to have the prophetic vision necessary to foresee that the minimum price laws would be held invalid only four years after they were held valid. Yet, now they are called upon to refund the total amount of the increased payments plus interest, despite the fact that a large portion of such amounts was paid to third parties as royalties and taxes to preserve and protect the leasehold interests dedicated under the gas purchase contracts.

The injustice and unfairness in requiring producers to refund the total amount of such increased payments plus interest at this time, irrespective of the equities of the case, is manifest, and is contrary to the fundamental principles of equity underlying the remedy of restitution pronounced by this Court and expressed by Justice Cardozo's opinion in *Atlantic Coastline R. Co.* v. *Florida*, 295 U.S. 301 (1935). During the course of his opinion Justice Cardozo clearly recognized that the essence of the equitable remedy of restitution was the discretion vested in a court of equity to make its determination according to the justice of the case:

> "'Restitution is not of mere right. It is *ex gratia* resting in the exercise of a sound discretion, and the court will not order it where the justice of the case does not call for it, nor where the process is set aside for a mere slip' (Citing cases). 'In such cases the simple but comprehensive question is whether the circumstances are such that equitably the defendant should restore to the plaintiff what he has received.'"

In accordance with the mandate contained in *Atlantic*, the District Court determined that equitably the Petitioners herein were entitled to certain countervailing equities, and that under the circumstances it was just and equitable to deny Natural's claim for interest. However, with utter disregard for the equitable considerations underlying the District Court's decision, the Court of Appeals arbitrarily determined, as a matter of law, that since Natural was not legally bound to make the payments to Petitioners, it was entitled to full restitution as a matter of right, together with interest thereon. Nowhere in its opinion does the Court of Appeals acknowledge that the determination of Natural's right to restitution and the awarding of interest thereon were matters of equitable discretion which could not be disturbed on appeal except for clear abuse. The Court of

Appeals simply applied rigid legal principles to the facts and refused to apply any considerations of equitable principles in deciding the case. This is not the law of restitution. To permit this decision to remain in its present posture is to ingraft an unwarranted limitation on the discretion of a court in equity to grant or deny restitution according to the justice of the case as it is commanded to do by the decision of this Court in *Atlantic*.

## POINT III.

### The Decision Rendered Below Determines the Rate To Be Charged For Gas Sold and Delivered by Petitioners to Natural From August 1, 1952, to July 1, 1954, and Thereby Invades the Plenary Jurisdiction of the Federal Power Commission, and Violates the Filed Rate Procedure Established by the Natural Gas Act.

1. *The Filed Rate Is the Only Legally Enforceable Rate.*

Section 4 of the Natural Gas Act (15 U.S.C. 717c) provides for the filing of rates and the machinery whereby these rates may be increased; Section 5 of the Act (15 U.S.C. 717d) provides machinery whereby the Commission on a proper complaint can attack the filed rates and have them reduced. These sections relating to rate regulation have been described by this Court as "the heart of the new regulatory system." *Federal Power Com.* v. *Hope Nat. Gas Co.*, 320 U.S. 591, 611 (1944). Thus, the very core of the regulatory scheme created in the Natural Gas Act is the observance of the filed rate as the only legal rate, and no deviation or modification can be recognized unless established pursuant to the prescribed procedure. To sanction an unfiled rate violates the whole statutory scheme and defeats the congressional purposes in enacting the Natural

Gas Act. The decision of the court below awarding Natural $1,623,770.23 enforces the contract rate of 6.253¢ per Mcf. which was not the filed rate, and, therefore, not a legally enforceable rate.

The contract rate in this case was subject to the exclusive jurisdiction of the Federal Power Commission and should have been filed with the Commission. The lack of knowledge of the parties is no excuse and the fact that the contract was not filed with the Commission did not alter the situation or in any way divest the Commission of the jurisdiction given it under the Act. In order to effectuate a legal rate in the present case, the Natural Gas Act required that the contract rate be filed with the Federal Power Commission. No rate other than the filed rate was valid or legally enforceable, and the court below was without power or jurisdiction to fix a rate applicable to the period in question. *Montana-Dakota Util. Co.* v. *Northwestern P.S.C.*, 341 U.S. 246 (1950).

2. *No Filed Rate—No Enforceable Rate—No Judicial Rate.*

The parties were without knowledge that they were violating the law or that their action was wrongful. Had the Petitioners realized that they were considered a natural gas company, they would have filed a just and reasonable rate without reference to the contract, and upon appropriate findings the Commission could have fixed a just and reasonable rate. The Act leaves no area for the courts to act in fixing a rate for the past, and Congress has denied this authority even to the Commission. *Federal Power Comm.* v. *Hope Nat. Gas Co., supra.* The parties were in *pari delicto,* and the transaction having been completely executed, the Court should leave the parties where it found them. *Second Russian Ins. Co.* v. *Miller,* 268 U.S. 552

(1925); *Harriman* v. *Northern Securities Co.*, 197 U.S. 244 (1905).

The recovery allowed Natural is contrary to the policy expressed in the Natural Gas Act that every enforceable rate must be based on a contract filed with the Federal Power Commission. There was no legal rate from August 1, 1952, to July 1, 1954, and it was error for the court below to effectuate the contract rate of 6.253¢ Mcf. by granting Natural restitution. Such action by the court below constitutes an unwarranted judicial invasion of the administrative province and disregards the filed rate procedure established by the Natural Gas Act. This is a blow at the foundation of the regulatory scheme intended by Congress and requires the interposition of this Court by writ of certiorari.

## POINT IV.

**The Existence of Material Issues of Fact and the Necessity for Inquiry Into the Surrounding Facts and Circumstances in Order That the Equitable Discretion of the Court Could Be Properly Exercised Precluded the Rendition of a Summary Judgment.**

1. *Summary Judgment Was Premature.*

Natural's suit against Petitioners is predicated on the equitable remedy of restitution. This equitable remedy is not a matter of right, but is *ex gratia*, resting in the sound discretion of the Court. *Atlantic Coastline R. Co.* v. *Florida*, 295 U.S. 301 (1935). It is a proceeding where a full disclosure of the background facts which motivated the parties is not only desirable, but is a prerequisite to the exercise of the judicial discretion and a correct application of the law. By its very nature the issues involved in an

action for restitution are ill-adapted to summary ajudication and generally require the full exploration of a trial.

Here, the basic question is whether the circumstances are such that equitably Petitioners should restore to Natural all or any part of the amounts which they received in excess of their contract price pursuant to the Oklahoma minimum price law from August 1, 1952, to July 1, 1954. The answer to this controlling question is dependent upon the determination of certain subsidiary issues of fact. Why did Natural supersede the first minimum price order and yet pay the second under protest? Did Natural voluntarily pay the increased price under the second order? Did Natural comply with the 9.8262¢ rate in order to obtain a rate increase from the Federal Power Commission? Was Natural's action actuated by a deliberate desire to place it in a strategic bargaining position with Petitioners? Or, were the excess payments made in response to some form of "business duress"? Did Natural pay a reasonable price for the gas under the invalid order? If any restitution is to be allowed, is it equitable under all the circumstances to make the producer bear the burden of the added royalties and increased production taxes paid because of the first minimum price order? Did Petitioners actually threaten to shut down their wells unless Natural paid the minimum price established by the Oklahoma Corporation Commission? Or was this merely a figment of Natural's imagination? A determination of these questions, which were raised by Petitoners' pleading in the District Court, could not be made on motion for summary judgment because they involve issues of fact which had to be determined to properly qualify the court below to exercise its equitable discretion and make its award "according to the justice of the case." The mere existence of these material questions of fact indicates that summary judgment was premature, and since they involve considerations which

were the heart of Justice Cardozo's opinion in *Atlantic*, the failure to determine such crucial issues is in direct conflict with a decision of this Court.

## CONCLUSION

This test case involves important federal questions which concern the effect and application of the Natural Gas Act; its legal and financial consequences are far-reaching; the Court of Appeals has erroneously interpreted the *Panoma* case, and this error has resulted in a judgment which is in conflict with other decisions of this Court. Therefore, for these reasons, it is in the ultimate public interest to grant this petition for a writ of certiorari.

Respectfully submitted,

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## APPENDIX "A"

IN THE

# United States Court of Appeals

FOR THE FIFTH CIRCUIT

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No. 16206

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NATURAL GAS PIPELINE COMPANY OF AMERICA,
*Appellant and Appellee,*

v.

D. D. HARRINGTON, ET AL,
*Appellees and Appellants,*

(AND REVERSE TITLE)

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APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

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(July 9, 1957)

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Before **BORAH, RIVES** and **BROWN,**
Circuit Judges

RIVES, Circuit Judge: Restitution was sought by Natural from Harrington[1] for the difference between the contract

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[1] To avoid confusion, particularly from the cross-appeals, D. D. Harrington, et al, and their predecessors in interest, Panoma Corporation, will be collectively referred to as "Harrington", and Natural Pipeline Company of America as "Natural".

rate for the purchase of natural gas and the price paid in compliance with an order of the Oklahoma Corporation Commission which was later declared invalid by the United States Supreme Court. The district court found Natural entitled to restitution in the sum of $1,302,491.23. It deducted from the restitution claimed $321,279.00, being $237,000.00 paid by Panoma as increased royalties and $84,279.00 paid as increased gross production taxes, and allowed no interest prior to the date of the judgment. Both Harrington and Natural appeal.

Harrington insists that Natural is not entitled to any restitution; Natural contends that the court erred as to each of the several sums deducted, and in denying it full restitution plus interest. Since the district court rendered summary judgment, we must, in examining each of the questions, determine whether there was any genuine issue as to any material fact and whether the judgment was right as a matter of law.

Judge Estes' excellent opinion, reported in 139 F. Supp. at 452, et seq., relieves us of the necessity for making more than a brief statement of the facts. Under the contract effective December 1, 1946, and to endure so long as gas is produced in paying quantities, Harrington had agreed to sell to Natural the gas produced from Harrington's wells located in some 78,000 acres of gas reserves in the Guymon-Hugoton Field in Texas County, Oklahoma, at 7 cents per m.c.f. measured at 16.4 pounds per square inch, equivalent to 6.253 cents when measured at 14.65 pounds pressure and 60 degrees Fahrenheit. On December 9, 1946, a few days after the effective date of the contract, the Oklahoma Corporation Commission entered its first order fixing a minimum price of seven cents for all gas measured at 14.65 pounds and 60 degrees Fahrenheit removed from the Guymon-Hugoton Field. Natural refused

to comply with this order, and, on May 17, 1951, the Oklahoma Commission directed Natural to pay the difference between the contract price and the seven cents minimum price. Natural posted bond and superseded the order. No payments were ever made under that first order.

On July 29, 1952, the Oklahoma Commission issued its second order increasing the minimum price to 9.8262 cents. The effective date of this order was delayed until September 10, 1952. On September 9, 1952, Natural notified Panoma, Harrington's predecessor, that it would appeal from the order and would *not* supersede, but (repeated with each payment) that it would pay the 9.8262 cents under protest, and would, upon success in the appeal, seek restitution for the amounts paid in excess of the contract price with lawful interest thereon.

Without considering the Natural Gas Act enacted by Congress in 1938, 52 Stat. 833, 15 U.S.C. §717v, the Supreme Court had in 1950 upheld the validity as against certain constitutional objections of the first Oklahoma minimum price order. *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U.S. 179. Following the landmark case of *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, the second order was declared invalid on April 11, 1955, because "such a sale and transportation cannot be regulated by a State but are subject to the exclusive regulation of the Federal Power Commission." *Natural Gas Pipeline Co.* v. *Panoma Corporation, et al.*, 349 U.S. 44.

Meanwhile, on July 1, 1954, pursuant to a plan for liquidation, Panoma transferred all its assets to its stockholders, Harrington, et al., the defendants below. The consent of Natural to certain assignments of the contract incident to such transfer was required, and, in consideration of Natural's consent, Harrington, et al., executed a letter containing the following obligation:

"That we hereby jointly and severally agree on behalf of ourselves, our executors, administrators and assigns to pay you or cause to be paid you any sums of money with lawful interest thereon which you are entitled to have refunded or returned with respect to the payments to Panoma Corporation in excess of the contract price made under protest referred to in said letter of September 9, 1952. We do also jointly and severally, for ourselves, our heirs, executors, administrators and assigns agree to and do hereby acknowledge and assume any obligations imposed upon Panoma Corporation by virtue of the letter you addressed to it under date of September 9, 1952."

Harrington, et al. resold the major portion of the assets to third persons, and received therefor $40,000,000.00 in cash plus other valuable considerations. The restitution here sought is for claimed overpayments for gas delivered between September 10, 1952, the effective date of the second Oklahoma minimum price order, and July 1, 1954, the date of sale of Harrington's assets.

Harrington's principal defense is based upon the equitable nature of the remedy of restitution so clearly expressed by Mr. Justice Cardozo in *Atlantic Coast Line RR Co.* v. *Florida*, 295 U.S. 301, 309, 319. In that case, an order of the Interstate Commerce Commission requiring an increase of intrastate rates because discriminatory against interstate commerce had been set aside "solely upon the ground that the facts supporting the conclusion were not embodied in the findings" (295 U.S. 311). The Commission thereafter "looked into the past and ascertained the facts. In particular it looked into the very years covered by the claims for restitution and found the inequality and injustice inherent in the Cummer rates during the years they were in suspense and during those they were in force." (295 U.S. 312).

"By the time that the claim for restitution had been heard by the master and passed upon by the reviewing court, the Commission had cured the defects in the form of its earlier decision. During the years affected by the claim there existed in very truth the unjust discrimination against interstate commerce that the earlier decision had attempted to correct. If the processes of the law had been instantaneous or adequate, the attempt at correction would not have missed the mark. It was foiled through imperfections of form, through slips of procedure * * * as the sequel of events has shown them to be." 295 U.S. at pp. 311, 312.

The Supreme Court directed that the claims for restitution be dismissed, holding that the federal court "discovers through the evidence submitted to the Commission and renewed in the present record that what was charged would have been lawful as well as fair if there had been no blunders of procedure, no administrative delays." (295 U.S. at 315). See also *United States* v. *Morgan*, 307 U.S. 183, 196.

Harrington calls attention that in the instant case the order of the Oklahoma Commission was not invalidated on its merits, or because the rate of 9.8262 cents was unjust or unreasonable, but simply because exclusive jurisdiction was vested in the Federal Power Commission, and that that Commission, by its order of November 14, 1955, accepted as the present effective rate of Harrington's successor in interest, the same 9.8262 cents.

It should further be noted, however, that the invalidity of the order of the Oklahoma Commission was not caused by any defect or imperfection of form or slip of procedure but resulted from a total lack of jurisdiction. Further, the Federal Power Commission by its order of November 14, 1955, spoke for the future only, and did not possess the power enjoyed by the Interstate Commerce Commission in the *Atlantic Coast Line case, supra*, of looking into the past

and ascertaining the facts. Nor does any court possess such power for the purpose of fixing retroactively a just, reasonable, and lawful rate. Here the parties themselves had fixed the rate to be charged by their solemn and binding contract, and that contract rate could be changed only by the Federal Power Commission after a hearing conducted in accordance with Section 5(a) of the Natural Gas Act. *United Gas Pipe Line Co.* v. *Mobile Gas Corporation*, 350 U.S. 332. Moreover, in the *Atlantic Coast Line case, supra*, the railroad carrier was entitled to the protection of the order of the Interstate Commerce Commission against being required to accept the unreasonably low intrastate rates, while here the primary aim of the Natural Gas Act was "protection of consumers against exploitation at the hands of the natural gas companies." *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 685 (concurring opinion of Mr. Justice Frankfurter). Even the Federal Power Commission, which had exclusive jurisdiction, could increase the contract rate only because of considerations of the public interest and not on account of any claimed right of Harrington to relief from an improvident bargain. *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 355.

True, in *United Gas Pipe Line Co.* v. *Mobile Gas Corporation, supra*, the contract was filed with the Federal Power Commission, and here it was not so filed. Section 4(c) of the Natural Gas Act provides that:

> "Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices,

and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services."

Until the decision in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954), the parties, and indeed the Commission itself, had proceeded upon the assumption that the Commission had no regulatory jurisdiction over the rates of independent producers. After that decision, the Commission, by its Orders 174 and 174A, entered July 16, 1954 and August 6, 1954, respectively, fixed the time within which such producers could file their rates. Since the *Phillips* decision, it has become clear to all of the parties that the contract should have been filed with the Commission. The failure to file it earlier, however, did not prevent the jurisdiction of the Commission from attaching. *Interstate Natural Gas Co.* v. *Southern California Gas Co.*, 9th Cir., 209 F. 2d. 380, 384. There is nothing in the Natural Gas Act or in the orders of the Federal Power Commission to indicate that, under such circumstances, until the rates were filed there was *no* effective or lawful rate. To the contrary, the Act expressly provided for delay in such filing, and under the rationale of *United Gas Pipe Line Co.* v. *Mobile Gas Corporation, supra,* the contract rate, even though unfiled, became and remained the only lawful rate until changed by order of the Federal Power Commission. Any price in excess of the contract rate was then contrary to the spirit, if not the letter, of the Natural Gas Act.

Harrington insists, however, that the excess payments were voluntarily made by Natural, or at least that there was a genuine issue of fact as to whether they were involuntarily made under coercion of "business duress." Natural, of course, concedes that restitution will not lie if the excess

payments were voluntarily made.[3] Further, duress or coercion must exist, and the written protest does not, by itself, make the payments involuntarily. *Union Pacific RR Co.* v. *Dodge County Commissioners*, 98 U.S. 541, 544; *Bank of United States* v. *Bank of Washington*, 6 Pet. 8, 12 (U.S. 1832).

The order of the Oklahoma Commission directed,

> "That no gas shall be produced from any well located in the Guymon-Hugoton Field of Oklahoma except at a price of not less than 9.8262¢ per thousand cubic feet if sold at the wellhead or on the lease or drilling unit from which produced, or a price equivalent to not less than 9.8262¢ per thousand cubic feet at the wellhead if sold off the lease or drilling unit or otherwise utilized."

Assuming validity of the order, its violation carried criminal sanctions under an Oklahoma Statute (O.S., Title 52, Sec. 278) providing for a fine of not to exceed $5,000.00 or imprisonment in the county jail for not more than thirty days, or both such fine and imprisonment on those who violate its conservation laws. Mr. T. Murray Robinson, counsel for Panoma, Harrington's predecessor, filed an affidavit in which he conceded:

> "That after said order was entered, Mr. Coleman Hayes, who represented Natural Gas Pipeline Company of America in said proceedings, visited with me by telephone concerning the effect of said order on the relationship of Panoma and Natural. In the course of that conversation I told Mr. Hayes that in my opinion as a lawyer the order of the Commission would become binding unless superseded and that Panoma, like all others, would be compelled to abide thereby, and that in my opinion the order directed producers who were not receiving the minimum price to cease deliveries."

[3] For the basic reason of that rule, see 40 Am. Jur., Payment, Sec. 158.

Scant respect would be accorded to the laws of the State of Oklahoma, if it were held that Natural had to go further and speculate on whether Panoma actually would have ceased delivering gas if Natural had refused to pay the increased price.

Natural candidly admits that it was motivated not to supersede the order by its desire to seek from the Federal Power Commission increases reflecting the prices paid under the order, and thus to pass on the increase rather than itself bearing the entire risk. We do not agree with Harrington that such motive converted Natural's payment of the increased rate into a "calculated business maneuver." If anything, the choice between bearing the entire risk of loss and trying to pass it on increased the business duress on Natural to make payments in accordance with the order. See *Union Pacific RR Co.* v. *Public Service Commission*, 248 U.S. 67, 70.

Further, Harrington urges that the duress was not imposed by it but was exerted by the Oklahoma Commission. We need not stop to consider whether duress of a third person will suffice (see Restatement of Restitution, Sec. 70b), for, under the circumstances, the Oklahoma Commission was a representative of Harrington and other producers similarly situated. *Arkadelphia Milling Co.* v. *St. Louis S.W. Ry. Co.*, 249 U.S. 134, 146; see, also, *United Gas Pipe Line Co.* v. *Mobile Gas Corporation*, 350 U.S. 332, 347.

Harrington urges that an accord and satisfaction was effected by Panoma's acceptance of Natural's checks containing notations similar to that copied in the margin.[3] It

[3] "Acceptance of this check constitutes full payment of and settlement for the account described on the statement attached
* * *

Payment of gas purchased on original and supplemental contracts from June 23, 1954 to 10:00 A.M. July 1, 1954."

is elementary, however, that an accord and satisfaction can result only from an agreement, and, clearly, Natural made no offer of any agreement that would preclude it from seeking restitution when each of its checks was accompanied by a letter specifically renewing its protest as follows:

> "Such payment is, as to any part thereof in excess of that payable under the price provisions of said contract, made involuntarily and under protest with full reservation of all rights to seek restitution thereof as is more particularly set forth in our letter to Panoma Corporation dated September 9, 1952, a copy of which is attached hereto for your information."

We are in full agreement with the conclusion reached by the learned district judge that Natural is entitled to restitution.

The district court, however, denied Natural's claim for restitution in the sum of $321,279.00 representing payments made by Panoma, Harrington's predecessor, for increased royalties and increased production taxes. We have held that Panoma had no right to the increased price. It took the same with notice that the rights of all who were to share in such increase were disputed by Natural. It could not voluntarily pay its royalty owners and its taxes on the basis of the increased price at Natural's expense, when the validity of the increase was in dispute. *Ward* v. *Love County*, 253 U.S. 17, 24.

We think that the state law provided adequate means by which Panoma could have withheld the increased payments from its royalty owners until the termination of the litigation, or could have paid under protest with a right of recovery, or could reserve the right to itself or its successors to take credit for any overpayment against future royalties. Panoma received the increase in price for the use and bene-

fit of Natural, but it made no effort to protect Natural's interest.

Like considerations are applicable to the payments of taxes on the basis of the increased price. Additionally, it may be noted that Title 68, Section 1475 of the Oklahoma Statutes, 1951, provides for the payment of taxes under protest and their subsequent recovery. Indeed, the Fourteenth Amendment itself would prevent the state from collecting unlawful taxes by coercive means without incurring any obligation to pay them back. *Ward* v. *Love County*, 253 U.S. 17, 24. We hold, therefore, that the district court erred in denying Natural's claim for restitution to the extent of $321,279.00.

We agree with the district court that the clear intent of the letter of the stockholders, Harrington, et al., incident to Panoma's liquidation (see page 4, ante) was to assume the same liability that rested upon Panoma. We think, however, that its use of the expression "with lawful interest" referred to interest from and after the time when Natural might become entitled to restitution from such stockholders in lieu of Panoma. Ordinarily, a person liable to make restitution is under a duty to pay interest from the time he commits a breach of duty in failing to make restitution. Restatement of Restitution, Sec. 156(b). The duty to make restitution arose on April 11, 1955, when the Oklahoma order was declared invalid by the Supreme Court of the United States. Previous to that date, Panoma's acceptance of the increased price had been due, not to its fault or volition, but simply to the requirement that it comply with the order of the Oklahoma Commission, and for such period previous to April 11, 1955, we think that interest should not be allowed. See *The Claim of Jacobs* v. *Adams, Executor*, 1 Dallas 52 (U.S. 1781).

The district court denied the recovery of any interest, without seeking to take advantage of its discretionary power to refuse interest (*Okeechobee County, Florida* v. *Nuveen*, 145 F. 2d. 684, 687), but fully and fairly stating the reasons for such denial.[4] Each of those reasons was known to the parties on July 1, 1954, when Harrington, et al. agreed to pay Natural "any sums of money with lawful interest thereon which you are entitled to have refunded or returned with respect to the payments to Panoma Corporation in excess of the contract price made under protest referred to in said letter of September 9, 1952." Further, with deference, we disagree with the reasons assigned by th learned district judge. In our opinion, no duty rested on Natural to supersede the order, Natural's suggestion of an escrow arrangement should not prejudice its right to interest, and though it had received increased rates from its customers, such increase was granted subject to the provision recited in the order of the Federal Power Commission, that if Natural be successful in the litigation, "* * * it will refund to its utility customers, on a basis to be approved by the Commission, the sum or sums so recovered."

Finally, we find that there was no genuine issue as to any material fact and that Natural was entitled to judgment as a matter of law. Rule 56(c), Federal Rules of Civil Proce-

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[4] "As to the matter of interest, I have concluded that it is just and equitable, under the circumstances of this case, to deny plaintiff's claim for interest. In so concluding, I have taken into account all the facts and circumstances before me, including the fact that Natural could have superseded the operation of the order as to this gas, and kept the use of the money, by filing a mere undertaking without surety or penal amount (as did Northern Natural Gas Company); that it was willing to waive interest if Panoma would agree to the escrowing of the excess payments; and that for most of the period in question it has been able to recoup the excess payments by increased rates to its customers, so that it has not in fact been deprived of the use of the money."

dure. While the judgment might be affirmed in the part complained of in Harrington's appeal and reversed in the part complained of in Natural's appeal, it is simpler, we think, to vacate the entire judgment and remand the cause with directions to enter judgment in accordance with this opinion in favor of the plaintiff against the defendants for the sum of $1,623,770.23, together with interest at 6 per cent per annum from April 11, 1955 on such sum or any portions thereof remaining unpaid down to the date of payment, and with costs, and it is so ordered. The costs of this appeal are taxed against D. D. Harrington, et al.

VACATED AND REMANDED.

(SEAL)

A true copy

Test: EDWARD W. WADSWORTH

Clerk, U. S. Court of Appeals, Fifth Circuit, New Orleans, Louisiana.

# JUDGMENT

Extract from the Minutes of July 9, 1957

No. 16206

NATURAL GAS PIPELINE COMPANY OF AMERICA,

v.

D. D. HARRINGTON, ET AL.

(AND REVERSE TITLE)

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, vacated; and that this cause be, and it is hereby, remanded to the said District Court with directions to enter judgment in accordance with the opinion of this Court;

It is further ordered and adjudged that the appellees, D. D. Harrington, and others, and the surety on their appeal bond herein, National Surety Corporation, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

## APPENDIX "B"

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IN THE

# United States Court of Appeals

FOR THE FIFTH CIRCUIT

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No. 16206

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NATURAL GAS PIPELINE COMPANY OF AMERICA,
*Appellant and Appellee,*

v.

D. D. HARRINGTON, ET AL.,
*Appellees and Appellants,*

(And Reverse Title)

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APPLICATION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING

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(March 5, 1958)

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Before BORAH, RIVES and BROWN, Circuit Judges.

PER CURIAM: Leave to file a second petition for rehearing is denied. *Natural Gas Co.* v. *Panoma Corp.*, 349 U.S. 44. The notation of Mr. Justice Douglas's dissent shows that the Court considered the question presented by this second petition for rehearing. See also the recent per curiam opinions of the Supreme Court in No. 85, *Cities Service Gas Co.* v. *State Corporation Commission of Kansas*, decided January 20, 1958; and in No. 86 *Michigan*

*Wisconsin Pipe Line Co.* v. *Corporation Commission of Oklahoma,* No. 111 *Phillips Petroleum Co.* v. *Corporation Commission of Oklahoma,* No. 112 *Phillips Petroleum Co.* v. *Corporation Commission of Oklahoma,* No. 113 *Phillips Petroleum Co.* v. *Corporation Commission of Oklahoma,* decided January 27, 1958, 26 L.W. 3219.

Leave to file

DENIED.

## APPENDIX "C"

IN THE

# District Court of the United States

FOR THE NORTHERN DISTRICT OF TEXAS

AMARILLO DIVISION

NATURAL GAS PIPELINE COMPANY OF AMERICA, a Corporation,
*Plaintiff,*

v.

D. D. HARRINGTON, ET AL,
*Defendants.*

Civil Action
No. 2070

Plaintiff seeks restitution for the difference in its contract rate for the purchase of gas and the price paid under an invalid minimum rate order of the Oklahoma Corporation Commission. Plaintiff has moved for summary judgment.

The uncontroverted facts in this case are as follows:

Defendants and others under the firm name of Harrington and March, called "Sellers", being the owners of mineral leases covering 78,000 acres of land in the Guyman-Hugoton gas field, in the County of Texas and State of Oklahoma, entered into a "Gas Purchase Contract" effective December 1, 1946, with plaintiff, herein called "Natural", an interstate pipeline transporter of natural gas, whereby it was agreed that (1) Natural would expand its facilities, including construction of certain pipelines and a compressor station at a point designated in the contract; (2) Sellers would drill wells, install gathering lines, construct a gasoline and dehydration plant, etc., and maintain

and operate their property so as to make available for delivery the agreed quantities of gas; (3) Sellers would sell and deliver to Natural, and Natural would purchase and receive from Sellers stipulated quantities of gas per day; (4) said gas would be delivered to Natural at the intake side of its compressor station and by it compressed and redelivered to Sellers at Sellers' gasoline plant, where Sellers would remove certain constituents, including liquid hydrocarbons; (5) Sellers would redeliver the residue gas to Natural at its meter station near the outlet side of Sellers' plant, at which point title should pass to Natural; (6) Natural would pay for each thousand cubic feet of gas delivered, a base price (with certain adjustments for BTU's) of (a) until July 1, 1951, six cents, and (b) for five years thereafter, seven cents, the quantity delivered to be measured at a base temperature of 60° F. and an absolute pressure of 16.4 pounds per square inch (which prices are equal to 5.35974 cents and 6.253 cents per M.c.f. respectively for gas measured at 14.65 pounds pressure) with a slightly different price provision applying to gas used for fuel by Natural in its compressor station.

As to payment, the contract provided that Natural would render monthly statements to Seller showing the quantities of gas delivered, with supporting data, whereupon Sellers would render an invoice for such gas, and Natural would make payment; that if Natural should fail to pay any amount due, to the extent not in bona fide dispute, for a period of sixty days after its due date, Sellers could suspend deliveries of gas until such payment was made; that any statement or invoice was to be subject to correction within one year after payment made by Natural for gas delivered during any calendar month, but if claim for correction was not made within that time, such statement and invoice would become final as to both parties;

that Natural might at its option make payments of any amounts due by deposit to Sellers' "credit in the First National Bank and Trust Company of Oklahoma City".

It was further provided that:

> "This contract is subject to present and future valid laws and present and future lawful orders of all regulatory bodies now or hereafter having jurisdiction over the parties; and should at any time during the term of this contract either party, by force of any such law or regulation imposed, be ordered or required to do any act inconsistent with the provisions of this contract, the contract shall, subject to the other provisions hereof, continue nevertheless, but shall be deemed modified to conform with the requirements of such law or regulation."

It recited, among other things, that Natural contemplated the expenditure of large sums of money in the construction of pipe lines to Sellers' properties and:

> "because of such expenditures and because the nature of its business requires assurance that the gas reserves of Seller shall be continuously available to Natural during the entire period of this contract, the parties agree: that the provisions hereof shall be deemed covenants running with . . . the property . . . "

Deliveries of gas under the contract commenced in small quantities in August 1948. On about October 1, 1948, Panoma Corporation was created by the members of the Harrington and Marsh partnership, and the gas properties, together with all rights under the contract, were transferred to it. Deliveries by it of gas in substantial quantities commenced in November 1948, and continued thereafter.

This contract was an important one to both parties, and on August 1, 1952 and thereafter, the gas deliverable under it constituted a substantial portion of Natural's source of supply.

Under date of July 29, 1952, Oklahoma Corporation Commission (herein referred to as the State Commission), upon:

> "application of certain mineral owners in Texas County, Oklahoma, for an order determining the minimum price at which gas in the Guyman-Hugoton Field may be first purchased or sold",

entered its order No. 26096, providing that:

> "No gas shall be produced from any well located in the Guyman-Hugoton Field of Oklahoma except at a price of not less than 9.8262¢ per thousand cubic feet at the wellhead. . . . If the gas is processed for extraction of liquid hydrocarbons and sold during or at the conclusion of gathering, the price for the residue gas shall be not less than 9.8262¢ per thousand cubic feet" (with certain adjustments for BTU content).

Under this order gas was to be measured at 14.65 pounds per square inch absolute. Its effective date, August 1, 1952, was temporarily stayed by Commission order of July 31, 1952, until September 10, 1952,

> "during which time the appealing parties and all other parties interested who desire to further stay the enforcement of said order may file herein their supersedeas bonds, said bonds to be approved by the Commission."

A further hearing was had on September 10, 1952 to consider the "terms, conditions and amounts" of supersedeas bonds. No supersedeas bond was filed or proffered by Natural or Panoma. Such a supersedeas was filed by another pipeline company (Northern Natural), which is material here only as indicating one form of "bond" which was acceptable to the Commission. It constituted merely an undertaking, without surety, to perform "all things that may duly and legally be enjoined upon it by said order in

case said order shall be finally affirmed in whole or in part." It appears from the affidavit of the attorney who represented the mineral owner applicants for the order that this was a form of "bond" agreed to by him, and that if requested, he, as attorney for these mineral owners, would have agreed to the same form of bond for Natural.

Under date of August 26, 1952, Natural wrote Panoma, referring to Order No. 26096, and stating among other things:

> "You have informed us that you interpret such order as applying to the gas sold by Panoma to this Company . . . and have also informed us that, unless payments be made by us at the minimum price set forth in such order (instead of the price set forth in such contract), you will discontinue the delivery of gas . . . to us in accordance with the provisions of such contract. . . ."

The letter continued that Natural denied that the order could lawfully be applied to their gas; that it had filed notice of appeal, which it would prosecute; that pending final adjudication it was necessary that the gas be delivered to Natural in order that it might fulfill its obligations to its customers and provide supplies of gas to consuming areas served by it in accordance with its certificates of public convenience and necessity; that it could not replace said gas from any other source, on any reasonable basis; that its rights and the rights of its consuming public could not be adequately protected through the filing of a supersedeas bond; that it was necessary that its rights be protected and preserved pending the appeal; and stated:

> "Natural will therefore, each month, upon receipt of proper accounting statements, pay in accordance with the contract price and, in addition thereto, will make payments for the difference between such contract

price and the price fixed by the Commission for such gas in said order.

"Payments of all sums in excess of the contract price, however, will be made involuntarily and under protest because of the compulsion and coercion resulting from the threat of the order itself and your interpretation of such order as prohibiting you from producing and delivering such gas to Natural under said contract at a price less than the minimum price fixed by the Commission in such order.

"You will understand, of course, that such payment of such differences is and will be made involuntarily and under protest because of the compulsion and coercion of the order and the threat of the enforcement of the terms of such payment. In the event such order should be held invalid or inapplicable to the gas sold and delivered by you to us under such contract, Natural will assert the right under familiar doctrines of business compulsion, unjust enrichment and restitution to a return to Natural of the additional payments so made under protest, with lawful interest thereon."

It further suggested that by agreement the "additional amounts" be held in escrow by the bank pending final determination as to the order, all claims for interest to be waived.

Under date of August 30, 1952, the President of Panoma wrote the President of Natural, on the letterhead of Panoma, stating that Natural's letter had been submitted to "our attorneys" in Oklahoma City for recommendation and advice; that Mr. T. Murray Robinson, who was most familiar with the matter (and who, it may be noted, was the same attorney who represented the mineral owners whose application resulted in the order in question) was on vacation; that his associates were of the opinion that it would be contrary to Panoma's interests to agree to the suggested escrow agreement, but preferred to await his return

before stating their objections in writing; and suggesting a different agreement, stating, "We feel that the present order will undoubtedly be sustained."

Under date of September 9, 1953, Natural wrote Panoma a second letter, identical with its letter of August 26, except that it omitted (1) the statement that its rights and the rights of the consuming public could not be adequately protected by the filing of a supersedeas bond, and (2) the suggestion for an agreed escrowing of the payments above the contract price.

Natural did appeal from the order. It was held valid in its entirety by the Supreme Court of Oklahoma April 27, 1954,[1] but on appeal to the United States Supreme Court, that Court in a per Curiam opinion[2] April 12, 1955, held the order invalid, (and controlled by *Phillips v. Wisconsin*[3], decided on June 7, 1954) holding:

> "that such a sale and transportation cannot be regulated by a state but are subject to the exclusive regulation of the Federal Power Commission."

Meantime, pending the appeal:

1. At Panoma's request, payments for gas delivered under the contract were made to the First National Bank and Trust Company of Oklahoma City, Trustee for Panoma, until those for April, May and June 1954, which were, in accordance with Panoma's instructions, made direct to it. As provided in the contract, Natural furnished Panoma each month a statement of the quantities and BTU content of gas delivered, and Panoma submitted its invoice. Pano-

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[1] Natural Gas Pipeline Company of America v. Corporation Commission of Oklahoma (Sup. Ct. of Okla.) 272 P. 2d 426.

[2] Natural Gas Pipeline Company of America v. Corporation Commission of the State of Oklahoma et al, 349 U.S. 44, 99 L. Ed. 866.

[3] Phillips Petroleum Co. v. Wisconsin, et al, 347 U.S. 672, 98 L. Ed. 1035 (June 7, 1954).

ma's invoices, beginning with that dated September 11, 1952, for gas delivered in August 1952 showed the price per M.c.f. computed at the price fixed by the State Commissioner's order. Natural issued its voucher check for the amount of the invoice, showing on the voucher portion the date, aggregate amount and the words, "Payment of gas purchased during the month of .....", or similar language, and transmitted it to the payee with a letter of transmittal stating:

> "Such payment is, as to any part thereof in excess of that payable under the price provisions of said contract, made involuntarily and under protest with full reservation of all rights to seek restitution thereof as is more particularly set forth in our letter to Panoma Corporation dated September 9, 1952, a copy of which is attached hereto for your information."

Each such check had printed on it the words: "acceptance of this check constitutes full payment of and settlement for the account described in the statement attached."

A schedule attached to the complaint herein, the correctness of the computation being admitted in defendant's answer, itemizes by months, from August 1952 to June 1954 inclusive, the contract price and the amount actually paid under the State Commission's order. It shows the aggregate contract price for the entire period to have been $2,827,656.48, and the aggregate amount paid under the order $4,451,426.71, an "excess" of $1,623,770.23 (the amount for which plaintiff sues). It also shows a computation of interest at 6% to July 31, 1955 on the excess of each monthly payment, totaling $178,004.32.

2. Natural made certain applications to the Federal Power Commission for increased rates and for approval of revised tariff sheets, which were allowed by that Com-

mission by orders of December 9, 1953 and March 30, 1955. It is inferable that Natural included in support of its applications the increased price it was paying Panoma. Each of the orders of the Federal Power Commission allowing the increased rates provided for a refunding by Natural to its customers, on a basis to be approved by the Commission, of any amounts recovered by it from Panoma.

3. Panoma paid its royalty owners, and the Oklahoma production tax, on the basis of the 2.5263 cent order. From August 1, 1952 to July 1, 1954 Panoma paid to its royalty owners, because of the difference between the contract price and the 2.5263 cent price actually being received from Natural extra royalty and taxes amounting to $237,000.00, and extra Oklahoma production taxes amounting to $84,279.00. The sums so paid aggregated $321,279.00.

4. As of July 1, 1954, pursuant to an "Agreement and Plan of liquidation of Panoma Corporation", that corporation conveyed to its then stockholders, viz., the defendants herein, in stated unequal amounts, all of its assets including the contract with Natural. The major portion of these assets were simultaneously resold by defendants (to Dorchester Corporation) for $40,000,000.00 in cash and other valuable considerations. To obtain Natural's consent to this transfer, defendants made an agreement set forth in a letter dated July 1, 1954 from them to Natural, which recited the transfer of Panoma's assets in liquidation, stating that they were conveying certain of the properties referred to in Natural's letter to Panoma of September 9, 1952, and continued:

"It was understood that your execution and delivery of a certain instrument dated June 25, 1954, consenting to the assignment of the Gas Purchase Con-

tract from Panoma Corporation to us, and from us to third persons, was contingent upon your obtaining the following agreement on our part, to-wit:

"That we hereby jointly and severally agree on behalf of ourselves, our executors, administrators and assigns to pay you or cause to be paid you any sums of money with lawful interest thereon which you are entitled to have refunded or returned with respect to the payments to Panoma Corporation in excess of the contract price made under protest referred to in said letter of September 9, 1952. We do also jointly and severally, for ourselves, our heirs, executors, administrators and assigns agree to and do hereby acknowledge and assume any obligation imposed upon Panoma Corporation by virtue of the letter you addressed to it under date of September 9, 1952."

In this suit plaintiff seeks to recover from the defendants by way of "restitution" the difference, for the period from August 1952 to June 1954 inclusive, between the aggregate amount actually paid by it for gas delivered by Panoma referable to the contract of December 1, 1946, and the aggregate amount which would have been paid on the basis of the prices fixed by the contract, with interest at 6%. The case is now before the court on two motions by the plaintiff, (1) a Motion to Strike certain allegations of defendants' answer as insufficient, immaterial and impertinent, and (2) a Motion for Summary Judgment.

As I have determined to render a Summary Judgment on the plaintiff's motion, I deem it unnecessary to make any formal order on its Motion to Strike.

The facts hereinabove recited are uncontroverted. It remains to consider whether or not there is a genuine issue as to some other material fact, such that evidence thereon should be heard before proceeding to judgment. In briefs and argument, defendants urge that there is such an issue

as to (1) whether or not Panoma threatened to shut down its wells unless Natural paid the increased price fixed by the order of the State Commission; (2) whether or not the price fixed by contract was non-compensatory, and (3) because the remedy of restitution is equitable in nature, "all of the surrounding facts and circumstances" should be gone into.

Plaintiff alleges that Panoma, through its counsel, informed plaintiff that it expected to comply with the order, and construed it to require discontinuance of deliveries under the contract unless payments were made at the price set forth in it. The defendants deny, alleging that Panoma did not at any time threaten or inform Natural that it would discontinue any delivery.

The affidavit of Panoma's then President states that at no time did Panoma "or any of its authorized officers, agents, attorneys, or employees inform or advise Natural . . . that in the event (Natural) did not pay the amount in said price order provided or supersede same that Panoma Corporation would cease deliveries . . . " nor did Natural inquire of Panoma whether it would do so.

It appears from the affidavit of Panoma's attorney, Mr. T. Murray Robinson, that after the order was entered, Natural's attorney, Mr. Coleman Hayes, visited with him by telephone concerning the effect of said order on the relationship of Panoma and Natural, in the course of which conversation he told Mr. Hayes that in his "opinion as a lawyer, the order of the Commission would become binding unless superseded and that Panoma, like all the others, would be compelled to abide thereby", and that in his opinion "the order directed producers who were not receiving the minimum price to cease deliveries", and further that he "did not tell Mr. Hayes what Panoma would do, as I had no authority to so say."

Whether or not Panoma, in terms, threatened to discontinue deliveries if Natural did not meet the increased price, I do not consider to be of controlling materiality. It is uncontroverted that the order specifically forbade the production of gas from any well in the field except at the price designated; that the President of Panoma, in the letter of August 30, 1952 to the President of Natural, stated that "we feel that the present order will undoubtedly be sustained by the courts", which letter was in response to Natural's August 26, 1952 letter to Panoma stating that "you have informed us that, unless payments be made by us at the minimum price set forth in such order (instead of the price set forth in such contract) you will discontinue the delivery of gas" and contained no disavowal of such intention; that Panoma, by its Vice President, on September 9, 1952, wrote Natural that Panoma, contemplating a possible revision of the contract, would invoice Natural at 9.8262¢ for both the gas which was being delivered under this contract and certain other gas which was being delivered under a different contract providing a higher price, but that if the contract was not revised, "we reserve our rights to collect at a later date the difference between 9.8262¢ . . ." and the higher price for such other gas, which they later did; that when, on September 11, 1952 Panoma rendered its invoice to Natural for all gas delivered in August, it did so at the price fixed by the State Commission order, not at the contract price, and that it continued each month thereafter to render its statements to Natural on that basis for the gas delivered under the contract here in question. To the extent that any "threats" by Panoma might be thought to be essential to the existence of "business duress", I think the order itself, coupled with these uncontroverted facts, sufficiently show that Natural had a right to believe itself in imminent dan-

ger of having an important supply of gas interrupted if it did not accede to the order-fixed price, and that it was not discouraged in this belief by anything Panoma did — if, indeed, it would have been entitled to rely even on affirmative assurance from Panoma that it would violate the terms of the order by continuing deliveries at the contract price.

As to defendants' suggestions that there exists a genuine issue of fact on the question of whether or not the contract price was non-compensatory, I do not consider that an issue material to my decision. It is not my province to determine in this proceeding what would or would not have been a fair price for gas during the period in question. This would be true had the original price been fixed by an erroneous or invalid Commission order. (See *State Corporation Commission of Kansas* v. *Federal Power Commission*.[4]) And is all the more true here since the price now complained of by the defendants as non-compensatory was fixed by the arms length contract of the parties themselves.

I think the suggestion that there may be other "facts and circumstances" which would make an issue in the light of the equitable character of the remedy sought by the plaintiff is too indefinite to make a genuine issue as to a material fact. Counsel in argument and in response to my questions, indicated no particular material fact or circumstance which would be disputed; none are pleaded; and I believe the suggestion relates rather to the inferences and conclusions to be drawn from the uncontroverted facts already in the record than to any real dispute of fact.

As I see it, therefore, there is no genuine issue as to any material fact; the case is one for summary judgment; and it remains to consider what judgment should be rendered. Certain collateral contentions of the parties may be first considered.

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[4] 215 P. 2d 176.

1. Plaintiff contends that the defendants' letter of July 1, 1954, unconditionally bound them to repay the excess payments sued for, with interest, if the order should be held invalid. I do not agree. I construe the letter only to bind the defendants to pay whatever plaintiff would be entitled to recover against Panoma, and that the questions as to recovery *vel non*, and the amount of any recovery, are the same as they would be were Panoma the defendant.

2. Defendants contend that there was an accord and satisfaction as to the amount due for gas each month, and point (1) to the printed notation on the face of each of Natural's checks reading "acceptance of this check constitutes full payment of and settlement for the account described on the statement attached" and the written notation on the voucher portion of each check to the effect that it was for payment of gas purchased under the contract for a particular month, and (2) to the provisions of the contract that any statement or invoice should be subject to correction within one year but should become final "if claim for correction is not made within that time." Each of Natural's checks was accompanied by a letter renewing its rights to such restitution as set forth in its letter of September 9, 1952. It seems clear that there was no accord and satisfaction, and that the parties did not so intend.

3. Defendants contend that to permit Natural to recover the difference between the contract price and what it paid for the gas pursuant to the invalid order would be enforcing the price provisions of the contract as the rate for gas during the period in question, whereas it is now known that Panoma was a natural gas company within the provisions of the Natural Gas Act, whose rates could only be valid after filing with the Federal Power Commission; that the contract never having been so filed, its provisions as to price were

ineffective. Admittedly, neither of the parties supposed at that time that Panoma was required to file its rate schedules (contracts) with the Federal Power Commission, and it is a matter of common knowledge that that Commission itself did not know or believe that it had jurisdiction over the prices charged by gas producers for their product until after the decision in *Phillips* v. *Wisconsin*, June 1954.[3] To say now that Panoma, regardless of knowledge or lack of it, was under the legal duty to file its rates (viz., its contract) with the Commission and that its failure to do so had the effect of preventing the price provisions of its private contract from becoming binding as between the parties is highly technical and without merit in determining the equities of the parties. The authorities cited by the defendants do not require such a holding. I am not here concerned with the proposition that the parties could not by their contract oust the Federal Power Commission of its power to determine the lawfulness of rates. During the period here involved the Commission has not determined the contract rates applicable to this gas unlawful, nor prescribed a change therein. I decline to follow the defendants' contention in this respect. See *Mobile Gas Service Corp.* v. *Federal Power Commission*,[5] citing *Colorado Interstate Gas Company* v.

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[3] Phillips Petroleum Co. v. Wisconsin, et al, 347 U.S. 672, 98 L. Ed. 1035 (June 7, 1954).

[5] Mobile Gas Service Corp. v. Federal Power Commisison, 215 F. 2d 883, ..... U.S. ....., affirmed by opinion of the Supreme Court Feb. 27, 1956 in cases Nos. 17 (United Gas Co. v. Mobile Gas Corp.) and 31 (F.P.C. v. Mobile Gas Corp.) — Oct. Term 1955, in which Justice Harlan's opinion states:

> ". . . we hold that the Natural Gas Act does not give natural gas companies the right to change their rate contracts by their own unilateral action. . . .
>
> "From our conclusion that the Natural Gas Act gives a natural gas company no power to change its contracts unilaterally, it follows that the new schedule filed by United was a nullity insofar as it purported to change the rate set by its

*Federal Power Commission.*[6]

4. Defendants further contend that recovery by plaintiff is barred (a) because Natural could have superseded the order of the State Commission and did not, (b) because Natural, by obtaining orders of the Federal Power Commission for increased rates, passed on to its customers the excess payments to Panoma, and (c) by the two year statute of limitations. I have carefully considered each of these contentions, and find them to be without merit. The remedy of "restitution" originated in the field of judgments paid and later reversed, and there could be no occasion for its application in a case where the judgment had been superseded. With respect to judgments, it is said in *Restatement of the Law, Restitution*, Sec. 74 (p. 304)[7] that "anything

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contract with Mobile and that the contract rate remained the only lawful rate. . . . Any amounts paid by Mobile in excess of the contract rates on the basis of the erroneous order of the Commission were therefore unlawfully collected, and United is obligated to make restitution of the excess payments. Cf. Baltimore & Ohio R. Co. v. United States, 279 U.S. 781."

Justice Harlan's opinion in cases Nos. 51 (F.P.C. v. Sierra Pacific Power Co.) and 53 (Pacific Gas Co. v. Sierra Pacific Power Co.) dated Feb. 27, 1956, affirming 223 F. 2d 605, construing provisions of the Federal Power Act virtually identical to the Natural Gas Act, states:

" . . . The Commission has undoubted power . . . to prescribe a change in contract rates whenever it determines such rates to be unlawful. While this power is limited to prescribing the rate 'to be thereafter observed' and thus can effect no change prior to the date of the order. . . . "

" . . . But while it may be that the Commission may not normally *impose* upon a public utility a rate which would produce less than a fair return, it does not follow that the public utility may not itself agree by contract to a rate affording less than a fair return or that, if it does so, it is entitled to be relieved of its improvident bargain. Cf. Arkansas Natural Gas Co. v. Railroad Comm'n, 261 U.S. 379.

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[6] Colorado Interstate Gas Company v. Federal Power Commission, 142 F. 2d 943, affirmed 324 U.S. 581.

[7] Restatement of the Law, Restitution Sec. 74, (p. 304).

paid by way of settlement can be recovered . . . although the payer could have obtained a supersedeas." No reason is perceived why Natural owed any duty to Panoma to supersede the order. The suggestion that because it could have superseded, it was not put under any "business duress" by the order, if valid, would apply as well in principle to the field of judgments. As to the "passing on" by Natural to its customers, I do not consider that its rights in this suit are affected thereby, especially in view of the fact that the Federal Power Commission's orders granting it increased rates especially provide for refunds by it to its customers, of whatever amounts it should recover from Panoma. And as to the statute of limitations, the cause of action (for restitution) here asserted did not arise until the event happened on which the right to it depended, viz., the final determination of the invalidity of the State Commission's order, which was not until April 11, 1955, less than five months prior to the commencement of this action. *(Baltimore and Ohio Ry. Co.* v. *U.S.*[8]*)*. Accordingly, I hold against the defendants on each of these contentions.

This narrows the matter down to the controlling issues of law, viz., is Natural entitled, under the facts, to the remedy of restitution, and if so, is it entitled to recover the entire amount sued for, or are there countervailing reasons, equitable and otherwise, for limiting its recovery to a lesser amount?

I have heretofore indicated my conclusion that in making the "excess" payments Natural involuntarily did so under the coercion of "business duress." It was confronted with an apparently valid order of the State Commission which in terms forbade its supplier from supplying gas to it unless it paid the designated price. If it refused to pay, enforcement

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[8] Baltimore and Ohio R.R. Co. v. U. S., 279 U.S. 781, cited in the Supreme Court opinion in the Mobile case, Note 5 supra.

of the order would subject it to very great loss. If the order was valid, refusal to pay might be a violation of its own contract. A prior price-fixing order of the same Commission (the so-called 7-cent order of December 8, 1946) had been held valid, as against constitutional objections, by the Supreme court.[9 & 10] Natural certainly would not have been justified in ignoring the order or assuming it to be invalid. Defendants now assert that Natural should have known that Panoma would not comply with the order, because shutting down its wells would have shut off its own supply of gas for processing in its plant. Panoma's attitude at the time did not indicate that it intended to defy the order. It was quite to the contrary. But I doubt that even assurances from it that it would do so would have entirely eliminated the coercion resulting from the order itself, containing within its own terms the implication that the State Commission would exercise its powers of enforcement. While Natural's letters to Panoma of August 26 and September 9, 1952, and its continued reiteration that it was making the excess payments under protest, could not of themselves create a cause of action for restitution, they made it clear, and make it clear now, that Natural considered itself to be paying under coercion and that Panoma was so continually and unequivocally informed.

The remedy of "restitution" is a branch of the more general "money had and received," which is based on the proposition that where one has received money from another under such circumstances as to make it unjust and inequitable for him to retain it, he may be required to restore it. In general, and with limitations, "a person who has been unjustly

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[9] Cities Service Gas Co. v. Peerless Oil and Gas Co., 340 U.S. 179, 95 L. Ed. 190 (Dec. 11, 1950).

[10] Phillips Petroleum Co. v. Oklahoma, 340 U.S. 190, 95 L. Ed. 204.

enriched at the expense of another is required to make restitution to the other." *Restatement of the Law, Restitution*, p. 12. So, "what has been lost to a litigant under the compulsion of a judgment shall be restored thereafter, in the event of a reversal, by the litigants opposed to him, the beneficiaries of the error". (See dissenting opinion of Justice Cardoso in *Reed* v. *Allen*.[11]) If taxes have been paid under the duress of an unconstitutional act, they may be recovered. *State* v. *Akin Products Co.*[12] In the case cited, the Texas Supreme Court adopted the opinion of the Court of Civil Appeals, including the following language from *Crow* v. *City of Corpus Christi*[13]:

> "The early common-law doctrine of duress has been expanded (17 Am. Jur. p. 875) and many courts have adopted the modern doctrine of 'business compulsion' under which 'it is established that where by reason of the peculiar facts a reasonably prudent man finds that in order to preserve his property or protect his business interest it is necessary to make a payment of money which he does not owe and which in equity and good conscience the receiver should not retain, the payment may be recovered.' 40 Am. Jur. p. 831."

The principle of business duress has been applied to permit recovery of payments made under compulsion of an administrative order later held invalid. *Baltimore and Ohio R.R. Co.* v. *U. S.*,[14] *Mobile Gas Service Corp.* v. *Federal Power Commission*.[15] I hold that it is applicable here, and that Natural is entitled to recover the excess payments, ex-

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[11] Reed v. Allen, 286 U.S. 191, 76 L. Ed. 1054.

[12] State v. Akin Products Co. (Texas Supreme Court Jan. 4, 1956) 25 Tex. Sup. Ct. Reporter 177, affirming 279 S.W. 2d 409.

[13] Crow v. City of Corpus Christi, 146 Tex. 558, 209 S.W. 2d 922, cited in the Supreme Court opinion in the Mobile case, Note 5 supra.

[14] Baltimore and Ohio R.R. Co. v. U.S., 279 U.S. 781.

[15] Mobile Gas Service Corp. v. Federal Power Com., 215 F. 2d 883, affirmed by the Supreme Court. See Note 5 supra.

cept to the extent that countervailing equities make it unjust for it to do so. The remedy of restitution is not a rigid legal right, and in applying it I conceive it to be the court's duty to limit the recovery to the amount which, under the circumstances, in equity and good conscience, should be restored.

> "The claimant to prevail must show that the money was received in such circumstances that the possession will give offense to equity and good conscience if permitted to retain it. . . .
> The question no longer is whether the law would put him in possession of the money if the transaction were a new one. The question is whether the law will take it out of his possession after he has been able to collect it. . . .
> ". . . 'Restitution is not of mere right. It is *ex gratia* resting in the exercise of a sound discretion . . ." Cardozo, J., in *Atlantic Coast Line R.R. Co.* v. *State of Florida.*[16]

I hold that there are countervailing equities to the extent of $321,279.00, being $237,000.00 paid by Panoma to its royalty owners as royalty and $84,279.00 paid by it as increased gross production taxes, out of and by reason of the "excess payments" by Natural. These amounts were not retained by Panoma, but were paid out by it, and in my opinion necessarily so. To have withheld payment of royalty on a portion of the amount currently being paid for the gas by Natural would almost certainly have precipitated difficulties with the royalty owners, possibly to the extent of claims for cancellation of leases, avoidance of which inured to Natural's benefit. In making its payments, Natural is bound to have known that Panoma would have to pay out a part of the "excess payments" as royalties and gross production taxes. I believe it to be just and equitable to reduce the re-

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[16] Atlantic Coast Line R.R. Co. v. State of Florida, 295 U.S. 301, 79 L. Ed. 1451.

covery allowed Natural in this case below the entire amount sued for, by the sum of $321,279.00.

I cannot, however, follow the suggestion of defendants that I should also take into account some $412,000.00 in royalties and taxes paid out by Panoma prior to August 1, 1952, by reason of the difference between the contract price and the price promulgated by the State Commission in its prior order of December 9, 1946 (the so-called "7-cent" order). Natural made no payments above the contract price prior to August 1, 1952, nor by reason of the 7-cent order, and the amounts so paid out by Panoma have no connection with the restitution sued for.

As to the matter of interest, I have concluded that it is just and equitable, under the circumstances of this case, to deny plaintiff's claim for interest. In so concluding, I have taken into account all the facts and circumstances before me, including the fact that Natural could have superseded the operation of the order as to this gas, and kept the use of the money, by filing a mere undertaking without surety or penal amount (as did Northern Natural Gas Company); that it was willing to waive interest if Panoma would agree to the escrowing of the excess payments; and that for most of the period in question it has been able to recoup the excess payments by increased rates to its customers, so that it has not in fact been deprived of the use of the money.

I therefore hold that Natural is entitled to recover from the defendants the sum of $1,302,491.23, with interest only from the date of the judgment. In view of the defendants' letter agreement of July 1, 1954, I hold further that this recovery shall be from the defendants jointly and severally.

Counsel for plaintiff may submit a form of judgment, for consideration after notice to counsel for defendants.

DONE at Dallas, Texas, this 9th day of March 1956.

JOE E. ESTES
*United States District Judge*

## SUMMARY JUDGMENT ENTERED MARCH 22, 1956

Filed: March 22, 1956.

In the District Court of the United States for the Northern District of Texas, Amarillo Division.

Natural Gas Pipeline Company of America, a corporation, Plaintiff,

v. Civil Action No. 2070,

D. D. Harrington, et al., Defendants.

This cause came on to be heard on the motion of plaintiff for summary judgment as authorized by Rule 56 of the Federal Rules of Civil Procedure, and it appearing to the Court from the pleadings, stipulations and affidavits filed in support of and opposition to such motion that there is no genuine issue as to any material fact, and that plaintiff, as a matter of law, is entitled to a judgment against defendants for the sum of $1,623,770.23, less the sum of $321,279.00 representing payments made by defendants' predecessor in interest to its royalty owners as increased royalty and for increased production taxes, and that plaintiff should be denied recovery of interest prior to judgment.

It is Ordered, Adjudged and Decreed that summary judgment be, and the same is hereby, entered in favor of plaintiff, Natural Gas Pipeline Company of America, a corporation, against defendants, D. D. Harrington, Stanley Marsh, Jr., Estelle Fariss Marsh, Isabel Marsh McCormick

and T. J. Wagner, Jr., jointly and severally, for the sum of $1,302,491.23, with interest from this date at 6 per cent per annum, and with costs.

Dated March 22nd, 1956.

(S.) JOE E. ESTES,
United States District Judge.

Approved as to Form:

(S.) DAVID T. SEARLS,
GENE M. WOODFIN,
Attorneys for Defendants.

(S.) D. H. CULTON,
Attorney for Plaintiff.

# APPENDIX "D"

## PERTINENT PROVISIONS OF THE NATURAL GAS ACT OF 1938

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfuless of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either

completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 15 U.S.C. § 717c]

FIXING RATE AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION

SEC. 5 (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas

company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas. [52 Stat. 823 (1938); 15 U.S.C. § 717d]

ADMINISTRATION POWERS OF COMMISSION; RULES, REGULATIONS, AND ORDERS

SEC. 16. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act. Among other things, such rules and regulations

may define accounting, technical, and trade terms used in this act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours. [52 Stat. 830 (1938); 15 U.S.C. § 717o]

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957.

NO. 901

D. D. HARRINGTON, ET AL., *Petitioners*,

v.

NATURAL GAS PIPELINE COMPANY OF AMERICA, *Respondent*.

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## BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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April 23, 1958

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957.

NO. 901

D. D. HARRINGTON, ET AL., *Petitioners*,

v.

NATURAL GAS PIPELINE COMPANY OF AMERICA, *Respondent*.

---

## BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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The respondent, Natural Gas Pipeline Company of America ("Natural"), files this memorandum in opposition to certiorari sought by Harrington, et al.

The cause is for restitution of payments for gas, as they exceed the contract price, made under the mandate of an order of the Corporation Commission of Oklahoma, effective August 1, 1952, fixing a minimum price for gas greater than the contract price. The order was held void by this Court in *Natural* v. *Corporation Commission of the State of Oklahoma*, 349 U.S. 44 (April 11, 1955),[1] referred to as the *Natural* case.

Natural has filed a petition for certiorari from the decision below, complaining of a denial of interest for the period the

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[1]The petition refers to the case as "Panoma"; the case of *Natural* v. *Panoma Corporation* was a companion case arising under a prior order of the Commission; it has no relation to this controversy, except that petitioners, with some petulance, complain that Natural superseded in the former case but not in the latter; and Natural retorts that in both cases Panoma respected the order in the payment of royalties and taxes (for which petitioners had claimed credit).

order was being litigated. It asserts such denial: is categorically contrary to prior decisions of this Court; is wrong in principle because it leaves Harrington, et al. unjustly enriched by the use of the funds; is in violation of the policy of the Natural Gas Act; and erodes the principle of restitution in its application to the correction of administrative or judicial error.

We do not here discuss whether petitioners meet the qualifications of Rule 19, because the ensuing argument on the particular points will demonstrate they do not. In general, petitioners, receiving money under a void order, which thus was never beneficially theirs, urge that they be permitted to keep it, inconsistently with the common honesty expressed in the law of restitution, as applied to the correction of judicial and administrative error. Lest the primary law be forgotten, we attach, as Appendix A, a quotation from the excellent summary in *Reed* v. *Allen*, 286 U.S. 191 (1932), at page 203. The principle has continuously been reasserted, recently in *United Gas Pipeline Company* v. *Mobile Gas Service Company*, 350 U.S. 332 (1956).

We deny the following from the statement of the case, in the petition:

> "It is undisputed that these increased royalty and tax payments were necessary to continue in force the leasehold interests which contained the gas reserves dedicated under the gas purchase contract with Natural (T. 23,134)."

which is also immaterial.

Attacking seriatim the arguments of the petitioners, we say:

POINT I:

Asserting that the underlying order of the Corporation Commission of Oklahoma, of August 1, 1952, had validity and was ambulatory until the Federal Power Commission promulgated its 174 series of orders in the fall of 1954, with

conclusion that the order was in force when the over payments were made, that is, between August 1, 1952 and June, 1954.

Without boring the Court by an analysis of the Natural Gas Act,[2] it is enough to say that the *Natural* case held otherwise. The opinion states:

> "We held in Phillips Petroleum Company v. Wisconsin, 347 U.S. 672, that such a sale and transportation cannot be regulated by a State but are subject to the *exclusive regulation* of the Federal Power Commission. The Phillips case, therefore, controls this one."

Ex necessitate the Court had to consider the validity of the order (T. 48) as of its date, that is, on July 29, 1952, and its application to gas then to be sold; the order was complained of as of that time. If the Court had thought the Oklahoma order had any validity, it would have held it sound as of its date, down to the date of the *Phillips* case, or some other landmark, such as the series 174 orders of the Federal Power Commission.[3]

Expressly, and on the face of the decision, the contention is a twice told tale. It was urged on the Court in the *Natural* case, as witness the dissent of Mr. Justice Douglas:

> "Mr. Justice Douglas, being of opinion that State regulation of price is permissible until the Federal price regulation permitted by Phillips Petroleum Co. v. Wisconsin,

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[2]As early as 1942, the Act was held to preclude temporary or concurrent state action. See *Illinois Natural Gas Company* v. *Central Illinois Public Service Company*, 314 U.S. 498. Certainly regulation of price is of such quality as to require exclusive control in the Federal authority.

[3]The series 174 orders were directed against producers thought in default, to cure the default; the Commission had already regulations applicable to all natural-gas companies.

The argument has its own metaphysics. Assume the *Natural* case was decided before the *Phillips* case: could the Court declare the validity, pro tanto, of an order held void.

347 US 672, 98 L ed 1035, 74 S Ct 794, is imposed, dissents."

In a further proceeding under the *Natural* case, the invalidity of the order was reaffirmed as to all sales, wherever made. *Michigan Wisconsin Pipe Line Company* v. *Corporation Commission*, 26 L.W. 3219 (Jan. 27, 1958).

The contention is an afterthought in the litigation, not raised below until leave was sought to file a second petition for rehearing. The Fifth Circuit, upon exchange of mail, denied the leave sought, according to a memorandum of March 22, 1958 (petition 35), upon the argument here made, citing the *Natural* case and the cases which have reaffirmed it.

POINT II:

Asserting that the court below disregarded the "existence" of the Oklahoma order; that it subjected restitution to a rigid legal formula.

These are abstractions. That the Oklahoma order had existence was recognized; payment under it was the precedent of the claim for restitution. What more is to be required of the court below is not clear.[4]

It is also said that the decision in *Atlantic Coast Line R. Co.* v. *State of Florida*, 295 U.S. 301 (1935) (the *Atlantic* case), announcing that restitution is ex gratia, required that the Court of Appeals abide by the discretion of the District Court in allowing certain credits there allowed.

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[4]The petitioners vaguely claim that the desired recognition is to be implemented by allowing credit for sums paid to royalty owners and for taxation, in recognition of the order. The Court of Appeals (petition 30-31) discussed these items at great length and concluded that no allowance should be made. Primarily, the law of restitution does not take into account the relations between the payee and third persons. See *Southern Pacific Company* v. *Darnell-Taenzer Lumber Company*, 245 U.S. 531,533 (1918); *Central States Electric Co.* v. *City of Muscatine*, 324 U.S. 138,145 (1945); *Ward* v. *Love County*, 253 U.S. 17,24 (1920).

The five to four decision in the *Atlantic* case has been severely limited by the decision in *Chicago R.R. Co.* v. *State of Illinois*, decided March 17, 1958, 26 L.W. 3266, wherein (by another five to four decision) this Court refused to interfere with the distribution of a fund, which was deposited in Court to abide the validity of an order under appeal, after the order was found invalid under circumstances that indicated probability that the invalidity was of form rather than of substance. Clearly, the *Atlantic* case must now be held restricted to its particular facts.

Further, a casual reading of the case indicates that the equitable discretion referred to is exercised only to refuse recovery of payments which, under the facts, should honestly be retained by the payee. There the discretion was exercised to save repayment under an order intrinsically sound, and defective only as to form. It is absurd to attempt to apply the doctrine to a situation where the order is found to be congenitally without potency.

And if the reasoning is guised in the verbiage of "judicial discretion," that does not refer to the fantasy or preference of a trial judge; the language refers to a "sound discretion" (as does that of Rule 19). Such discretion must be agreeable to the dogma of the undisputed succession of cases awarding restitution in aid of the correction of judicial error, and subservient to the requirement that when a recipient of money is unjustly enriched by the duress of a void judgment or administrative order, equity in good conscience requires him to return with interest the sums that are not his. Where the order is void there is nothing called judicial discretion that perpetuates such unjust enrichment.

POINT III:

Asserting that because Harrington had not filed the contract as a rate schedule there was an absence of rate; with

conclusion that in some way restitution for the exaction above the contract price violates the Natural Gas Act.

It is true that the duty was on Panoma to file the contract as a rate schedule as required by the Natural Gas Act; it is odd that the petitioners should claim benefit from such default. In the situation, any court would treat as done what ought to be done. There is also the learning of the *Mobile* case that the only rate that Panoma could have filed was that of the contract.[4] The Court of Appeals below (petition 27) disposed of the contention in the following language:

> "Since the *Phillips* decision, it has become clear to all of the parties that the contract should have been filed with the Commission. The failure to file it earlier, however, did not prevent the jurisdiction of the Commission from attaching. *Interstate Natural Gas Co. v. Southern California Gas Co.*, 9th Cir., 209 F. 2d. 380,384. There is nothing in the Natural Gas Act or in the orders of the Federal Power Commission to indicate that, under such circumstances, until the rates were filed there was *no* effective or lawful rate. To the contrary, the Act expressly provided for delay in such filing, and under the rationale of *United Gas Pipe Line Co. v. Mobile Gas Corporation, supra*, the contract rate, even though unfiled, became and remained the only lawful rate until changed by order of the Federal Power Commission. Any price in excess of the contract rate was then contrary to the spirit, if not the letter, of the Natural Gas Act.

We think that disposition is accurate.

POINT IV:

Asserting that the summary judgment was inapplicable because certain facts and circumstances should have been

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[4]We note that the petition (17) states that Panoma, had it known its obligation, "would have filed a just and reasonable rate without reference to the contract." This would have had its own difficulties in view of the *Mobile* case. Panoma could have filed only the contract.

investigated so that the equitable discretion of the court could be properly exercised.

The argument is predicated on the assumption that the *Atlantic* case projects upon the trial court a discretion that has authority to temper justice with the spirit of compromise; but quite detached from the fact that the payor is out his money. However, the argument has its weakness; to pursue this rationalization, the conclusion is reached that the court must have exercised its discretion in refusing attention to the items complained of.

The facts and circumstances which it is claimed should be investigated upon a full trial are itemized as follows:

> "Why did Natural supersede the first minimum price order and yet pay the second under protest? Did Natural voluntarily pay the increased price under the second order? Did Natural comply with the 9.8262¢ rate in order to obtain a rate increase from the Federal Power Commission? Was Natural's action actuated by a deliberate desire to place it in a strategic bargaining position with Petitioners? Or, were the excess payments made in response to some form of 'business duress'? Did Natural pay a reasonable price for the gas under the invalid order? If any restitution is to be allowed, is it equitable under all the circumstances to make the producer bear the burden of the added royalties and increased production taxes paid because of the first minimum price order? Did Petitioners actually threaten to shut down their wells unless Natural paid the minimum price established by the Oklahoma Corporation Commission? Or was this merely a figment of Natural's imagination?"

So far as the items are of objective fact (the "genuine issue as to any material fact" of Rule 56), same were fully explored ad nauseam by each of the two courts below. The proposed psychoanalysis of Natural's motivations were, of course, not thought requisite. The trial court observed (petition 49):

> "I think the suggestion that there may be other 'facts and circumstances' which would make an issue in the light of the equitable character of the remedy sought by the plaintiff is too indefinite to make a genuine issue as to a material fact. Counsel in argument and in response to my questions, indicated no particular material fact or circumstance which would be disputed; none are pleaded; and I believe the suggestion relates rather to the inferences and conclusions to be drawn from the uncontroverted facts already in the record than to any real dispute of fact."

For the reasons stated, we think the petition is improvidently filed.

Respectfully submitted,

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## APPENDIX A

Extract from opinion by Mr. Justice Cordozo in *Reed* v. *Allen*, 286 U.S. 191 (1932), at 203:

> "The rule is abundantly settled both in this court and elsewhere that what has been lost to a litigant under the compulsion of a judgment shall be restored thereafter, in the event of a reversal, by the litigants opposed to him, the beneficiaries of the error. * * * Two remedies exist, the one by summary motion addressed to the appellate court, the other by a plenary suit. The books show that it has long been the practice to embody in the mandate of reversal a direction that the plaintiff in error 'be restored to all things which he hath lost by occasion of the said judgment.' * * * What this was might be ascertained through an order to show cause known as a scire facias quare restitutionem habere non debit. * * * Inquiry was then made whether anything had been taken 'by colour of the judgment', * * * with an appropriate mandate for the return of anything discovered. On the other hand, the litigant who has prevailed on the appeal is not confined to a motion for summary relief. He may elect to maintain an action, or the court in its discretion may remit him to that remedy. * * * One form of remedy or the other, however, is granted as of right. The remedy in its essence like the one for money had and received is for the recovery of benefits that in good conscience may no longer be retained. 'It is one of the equitable powers inherent in every court of justice, so long as it retains control of the subject matter and of the parties, to correct that which has been wrongfully done by virtue of its process.' * * * Indeed, the correction may extend to cases where the postulants for restitution are not even parties to the record. * * * The whole subject has heretofore been dealt with in a spirit of the largest liberality. The judicial process has been moulded with an anxious effort to put an end as speedily as may be to wrongs originating in judicial errors."

## CERTIFICATE OF SERVICE

I certify that on April , 1958, I deposited in a United States mail box, with first class air mail postage prepaid, copies of the foregoing petition, addressed respectively to counsel of record for Petitioners, at their post office addresses, that is:

To Messrs. DAVID T. SEARLS
GENE M. WOODFIN
J. EVANS ATTWELL
11th Floor, Esperson Building
Houston 2, Texas

To Mr. HUGH L. UMPHRES
505 Amarillo Building
Amarillo, Texas

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*Counsel of Record for Respondent*